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*83 AGENDA FOR 2000 A.D.-A NEED FOR SYSTEMATIC ANTICIPATION

Keynote Address by THE HONORABLE WARREN E. BURGER

Chief Justice of the United States

We open this meeting of judges, lawyers and scholars here at the scene of Roscoe Pound's 1906 speech to the American Bar Association in order to remind ourselves of what he said and to underscore the sobering reality that progress is slow and that much remains to be done. On that occasion Pound gave to our profession, and to the country, the first truly comprehensive, critical analysis of American justice and of problems that had accumulated in the first 130 years of our independence. In that span of time our country had grown from three million people in a largely rural society on the Eastern seaboard to 85 million people spread over a continent with rapidly expanding cities built around a dynamic industrial economy.

The conference we open tonight is significant because it is the first time that the chief justices of the highest state courts, the leaders of the federal courts, leaders of the organized bar, legal scholars and thoughtful members of other disciplines have joined forces to take a hard look at how our system of justice is working. We will ask whether it can cope with the demands of the future, and begin a process of inquiry into needed change. But this meeting will be judged not on its unique composition but on what it stimulates for the years ahead.

If we are to justify taking two days' time of more than 200 leaders of the law, it will be useful to make clear what we are *not* here to do. That is a task easier, perhaps, than to say with precision what we hope to accomplish. We are not here to deal primarily with specifics and details but with fundamentals.

Since Pound spoke here 70 years ago, there have been countless conferences, seminars, and studies on every aspect of the administration of justice. A review of those gatherings demonstrates, however, that, as Pound said, we have been "tinkering where comprehensive reform is needed." Although we have indeed been tinkering, we have also been doing a good deal more than in some earlier periods, when, as Pound said, our profession thought it was making progress by eliminating "all ***84** Latin and law-French terms from the law books." But any suggestion that nothing has been done in these 70 years would be very wrong. A great deal was done, and much of it was due to what he set in motion here.

But we have not really faced up to whether there are other mechanisms and procedures to meet the needs of society and of individuals. And, even if what we now have is presently tolerable, we must ask whether it will be adequate to cope with what will come in the next 25 or 50 years given the dynamic expansion of litigation in the past ten years, the growth of the country, and the increasing complexity of both. When a city or state grows from three to four million, that increase brings tensions in labor-management relations, in schools, in zoning and housing questions, in civil rights claims, and in a host of other areas. In this final quarter of the 20th century we will see changes in our society that will create even more demands on the judicial systems.

Because the world has experienced more changes in these 70 years than in the preceding 700, we must be prepared to lift our sights even higher than Pound had in mind, for the year 2000 will be on us swiftly. Today many nations, most agencies of our own government, and private industry have long had studies underway to prepare them to cope with the future. One writer calls this "systematic anticipation," and we must concede that the judiciary may be lagging in this process and that we need the help of other disciplines.[1] So I submit that as long as we are inquiring and probing, not proposing or deciding, we do it boldly, not timidly-candidly, not apologetically.

I

As we begin, it may be beneficial to consider the conditions that Pound and his generation confronted in 1906, to see how they and later generations responded to those conditions. An examination of their successes and failures will help us decide how we should begin to prepare for the next 25 years and beyond.

At the turn of the century Pound and others were attempting to bring rationality and order to the economic and social chaos caused by the industrial revolution, by the consequent growth of our cities and by the waves of immigration that transformed this country in the second half of the 19th century. The major concern of Pound and his colleagues was fashioning better ***85** means by which people could have their disputes resolved because it was apparent to them as they entered the 20th century that the institutions of the 19th were not adequate.

Many years after the St. Paul meeting of 1906, Herbert Harley characterized Pound's speech as a "map to the territory, with the roads plainly shown," but no transportation provided. Pound knew, as we know, that no one speech, no one conference, would solve the problems, and after 1906 he and a few others set out to create the "vehicles" necessary to get from where they were to where they wanted to go. Pound was not satisfied with anything less than fundamental changes.

Our task, then, once we review what has gone before, is to reexamine the "map" Pound drew, to assess the direction of the roads he laid out, and to consider whether we need, not just to tighten "nuts and bolts," but to begin work on the design of some new-even radically new-"vehicles" to take us where we want to go in the years ahead.

It may be worth more than a footnote, and help us to gain perspective, to remember that when Pound spoke in this chamber many of the audience came from the downtown hotels by trolley cars that had just replaced the horse cars, and some perhaps came by horse and buggy. Where the parking meters now stand were hitching posts for horses. The horses and buggies are gone-even the trolley cars are gone-and men like Henry Ford, Louis Chevrolet, and the Wright Brothers have altered our lives drastically. Yet we see that, fundamentally, the methods for settling disputes remain essentially what they were in that day.

Perhaps what we need now are some imaginative Wright Brothers of the law to invent, and Henry Fords of the law to perfect, new machinery for resolving disputes.

In considering new approaches we must not be deluded by the kind of pleasant, but erroneous, assumptions held by Pound, that America was entering a period of relative tranquility in which it could concentrate on providing efficient means to remedy old wrongs and create a better, fairer society. Of course, he did not foresee the terrible destruction of World War I, or the upheavals that would follow it, spawning more wars and disorders down to this day. And although Pound was sensitive to the legitimate complaints of the great mass of working people, he had not yet grasped fully the needs of racial minorities nor the changes that would be stimulated when those rights ***86** gained recognition. But Pound clearly saw the need to fashion systems of dispute settlement to meet the conditions of 1906, in which working and middle income people were more and more crowded into the large cities and were increasingly frustrated by the tensions, the demands, the physical and emotional abrasiveness of a new way of life far removed from life in a small town or on a farm.

Pound understood that the old tests based on 19th century notions of liberty of contract did not meet the needs of people for compensation for on-the-job injuries and for protection against such things as tainted food and exploitation of child labor. Added to all this was a growing crime rate and the advent of the automobile, bringing with it a whole new set of social and economic consequences-all having an impact on the courts.

He recognized that no one would ever be fully satisfied with law or with any system of justice. That dissatisfaction, as he said, was "as old as law" itself, but he thought much of it was justified, for the court seemed powerless to give relief to the victims of harsh new conditions of industrial and big city life.

Pound focused on the court system, which he called "archaic," and on court procedures, which he said were "behind the times" and wasteful of judicial time. He condemned (to use his words) "the sporting theory of justice *** so rooted in the profession in America that most of us take it for a fundamental legal tenet." What he meant by the sporting theory was that lawyers, instead of searching for truth and justice, often tended to seek private advantage, forgetting they were officers of the court with a monopoly on legal services that mandated duties to the public as well as to clients.

Pound called on the leaders of the profession to act. Remember that in 1906 the American Bar Association was a small, conservative organization; there was no American Judicature Society, no American Law Institute, no Institute of Judicial Administration. Only a few lawyers and judges and a handful of legal scholars were willing to examine the deficiencies of the court systems in relation to peoples' needs.

Since 1906 an array of dynamic organizations devoted to improving justice has come into being. We realize that no one speech or conference can change things overnight. But the long range reaction of the legal community to Pound's speech suggests that speeches and conferences can indeed lead to action in a free society. When he spoke here the A.B.A. delegates ***87** greeted his address without enthusiasm, and although the next year the Association created a special

committee to investigate the complaints he made, the report of that committee was never adopted. Yet the influence of what he said is illustrated in our using the title of his speech to describe this conference.

The American Judicature Society was organized in 1913 largely due to Pound's influence, and it is perhaps the classic example of the value of enlisting non-lawyers in the search for better justice. Experience has shown, however, that it is not easy to make use of other disciplines except by constant emphasis that specialists in public and business administration and the social sciences can help us. In the ultimate sense Pound considered the function of the courts to deliver social and economic justice according to standards established by law. That is very different from social and economic justice according to the philosophy of judges. In this limited sense those adjectives are clearly implied in the words "equal justice." That, of course, was the objective of the Declaration of Independence, the Constitution, the Bill of Rights.

Another measure of the change in attitudes of our profession is shown in the American Bar Association's transition from the elite group that reacted with hostility to Pound in 1906 into a progressive body composed of 210,000 representative lawyers.

The American Bar Association was one of the moving forces in the 1971 National Conference on the Judiciary in Williamsburg, Virginia, where the National Center for State Courts was conceived and very soon brought into operation. The A.B.A. was the chief instrument in 1969 in developing the Institute for Court Management, which has stimulated a great expansion in the use of court administrators in both state and federal courts.

No review of the new organizations can fail to mention the change in attitudes of leaders of the bench and bar. Chief Justice Taft took the lead in creating what is now the Judicial Conference of the United States, one of the three sponsors of this conference, and the momentum of his efforts is still felt to this day. The presence here of representatives of the Supreme Courts of 50 states and other comparable jurisdictions, their counterparts in the federal system, and other leaders, demonstrates that those who now hold positions of responsibility acknowledge an obligation to do something to improve the administration of justice.

In 1906 there was profound concern over processes of judicial selection and what we now call the "merit selection system" ***88** emerged with a decade. Later this week, Justice Finch (Mo.Sup.Ct.), the President of the National Center for State Courts, will discuss that subject.

If there have been disappointments with some of the new developments, a major one was the failure of small claims courts to fulfill their early promise. These courts appeared in some Midwestern States soon after Pound spoke, and by the 1920's they were used in many large American cities. In many places they have gradually drifted away from the simplified processes essential for speedy and inexpensive disposition and they need a fresh look.

Many valuable studies have been made of the work of the trial courts and appellate courts, including the Supreme Court of the United States, but they will have value only if they serve to persuade legislators to act, and to rely on those studies for guidance.

Now pending in Congress is a four-year-old request for 65 desperately needed district and circuit judges, based on studies the Administrative Office of the United States Courts made at the request of the Congress. The Senate has now approved 52 new judgeships, but we will have no additional judges until the House acts. While we wait there is a near crisis situation, particularly in the courts of appeals. This leads me to suggest that it may be time to consider whether providing an adequate number of judges can be better dealt with in some other way. In Florida, for example, the state Supreme Court establishes uniform criteria for the need of additional judges and makes recommendations to the legislature which is required to act. Political factors are thereby minimized. Were a similar measure adopted on the federal level, the need for judgeships would not be caught up in the complexities of politics, elections and other irrelevant considerations, when both the executive and legislative branches are preoccupied with matters totally foreign to the needs of the courts.

This procedure should be studied to see if it would fit the federal system.

Since Pound spoke, other improvements that can fairly be called "tinkering" were developed-the merger of law and equity, the Administrative Procedures Act and the requirement that federal courts apply state law in diversity of citizenship cases. Diversity jurisdiction, which Pound characterized in 1914 as a cause of "delay, expense, and uncertainty," still plagues us, despite numerous studies which advocate such jurisdiction ***89** of federal courts be curtailed or abolished. Also worth noting is the use of six-member juries in civil cases, a practice first introduced by Chief Judge Devitt and his colleagues here in Minnesota and subsequently adopted almost universally by the federal courts. [2] This has saved time and expense with no adverse effect on litigants.

II

After the event it is easy enough to regard some of this progress as "petty tinkering," but without it the administration of justice might well have collapsed by now. It is far easier to do what we lawyers often do-praise our system as the best ever devised and denounce anyone who dares to suggest that we consider, not only periodic adjustment, but major and systemic changes. The inertia of some lawyers, judges, and legislators is such that nothing less than a collapse of the system will bring them to consider change.

There are others, however, with a passion for reform, which can be a valuable asset, but like all passions it needs to be regulated and channeled if we are to avoid hasty and ill-considered change. We sometimes develop an alleged "reform" and then turn to new fields and assume that the first effort has no flaws. It might be helpful when we enact "reforms" to give them a short term-five or ten years-and then subject them to audit and critical analysis. My colleagues, Justices Black and Douglas-not in jest but in complete seriousness-said many years ago that new regulatory agencies and new government programs should be dismantled after a fixed period-ten years or so-and not reinstated unless a compelling need were shown. Coming from two architects of the massive changes of the 1930's, the Black-Douglas admonition should carry weight.

Whatever risks may be involved in our probing and talking, we must be prepared to take them. There is nothing dangerous about studying and considering basic change, if the alterations will preserve old values and "deliver" justice at the lowest possible cost in the shortest feasible time. I do not, for example, think it subversive to ask why England, the source of all our legal institutions, found it prudent and helpful 40 years ago to abandon jury trials for most civil cases. A whole range of important kinds of civil cases have been tried without juries ***90** since the beginning of the republic. If, as some American lawyers ardently advocate, it is sound to consider adopting British concepts of pretrial disclosure of all prosecution evidence in criminal cases, I hardly think we endanger the republic if we also make thoughtful inquiries into England's civil procedures, and their ideas of finality of judgments, short of three or four appeals and retrials.

When we make changes, their operation must be monitored to be sure they are working as we intended. One example will make this point. The 1964 Criminal Justice Act and the 1966 Bail Reform Act were major developments responding to need in the federal system, but we cannot assume that such important programs were perfect on "the first try." Each of these acts was one that most informed people would call "good" legislation. Now, a decade and more of actual experience shows that the interaction of these two improvements created vexing problems not anticipated. Lawyers supplied to indigent defendants at public expense do, as they should, what privately paid lawyers do for their clients, which means satisfying the clients' lawful requests. Inevitably, the first request is "get me out." Here the Bail Reform Act comes into play and the odds are that the accused will be released pending trial in all but a rare case involving a murder charge.

It now appears, especially in larger cities that crimes are committed by persons while released pending trial on earlier charges. It is not uncommon for an accused, when finally tried, to have other indictments pending. If the matter is disposed of by a guilty plea, or after conviction on one charge, there is some evidence of a tendency to dismiss or defer

other charges and to impose a single sentence. In high crime rate communities, law abiding people must be forgiven if they ask whether such practices are giving rise to a belief that a criminal can commit two, or even three, crimes and pay the price for only one. That this reaction may not withstand careful analysis does not alter the disturbing reality of public opinion engendered by the evening newscast reporting homicides and other serious crimes.

This phenomenon is related to the actual operation of the Bail Reform Act, in which likelihood of flight in most cases is the only test, and no consideration is given to possible danger to the community. Here, we cannot be sure of the answers because we do not know all the facts. The facts we need can be found only by a careful study in one or more sample jurisdictions ***91** to probe, case by case, name by name, and determine how many arrests have been made of persons who were on release pending trial on a prior charge.[3] Only then will we know whether the Bail Reform Act needs reexamination and amendment.

It is a very serious matter when whole communities become emotionally aroused-as they are these days-by a constant pattern of serious crimes. We should not be heard to complain at the loss of public confidence in our legal institutions if people come to think that government is impotent to protect its citizens.

Nor should we be surprised at the loss of public confidence caused by lawyers' using the courts for their own ends rather than with a consideration of the public interest. If Pound was correct in his analysis that excessive contentiousness was an impediment to fair administration of justice in 1906, I doubt that anyone could prove it is less so today. Correct or not, there is also a widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense. The willingness of some of the participants to elevate procedural maneuvering above the search for truth, as Pound said, sends out “to the whole community a false notion of the purpose and end of law.” And he saw this as a large factor in the American cynicism about the law and the urge to want to “beat the law.”

When Pound challenged the exaggerated contentiousness of the adversary system, the aggressive spirit of some American lawyers-the contentiousness that Pound said was perverting the adversary idea into a sporting contest-asserted itself in attacks on Pound. Some of these lawyer critics spoke as though the courts were the private property of lawyers, rather than instruments for the benefit of people.

Those few critics of Pound did not seem to know-or perhaps care-that England, the cradle in which the adversary system was nurtured, had worked out ways to control the damaging excesses of the contentious spirit. And anyone who ***92** has observed both the American and British courts at close range knows that there is no more vigorous advocacy or fairer justice than in British courts, and at the same time they maintain strict regulation of lawyers' professional conduct, as we do not. When juries are used, England's courts manage to do without spending days and weeks selecting a jury. Even the most ardent opponents of stricter regulation of lawyers are beginning to have some doubts, for example, about whether the jury selection process, which is provided as a means to insure fair, impartial jurors, should be used as a means to select a favorable jury.

I believe that American lawyers, by and large, are the equal of any in the world, but a handful of members of any profession can inflict harm out of proportion to their number, on both the public and on the image of their profession.

Other conditions that caused dissatisfaction in 1906 are still with us. Jurors, witnesses and litigants continue to have their time squandered. They are often shuffled about court-houses in confusion caused by poor management within the courts. The delays and high costs in resolving civil disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by fees and expenses. Inordinate delay in criminal trials and our propensity for multiple trials and appeals shock lawyers, judges and social scientists of other countries.

There is nothing incompatible between efficiency and justice. Inefficient courts cause delay and expense, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited-to use the words of Moorfield Story, a former president of the American Bar Association [4] -by the litigant "with the longest purse." Every person in this conference knows how the "long purse" has been used to produce long delay and a depreciated settlement. Efficiency-like the trial itself-is not an end in itself. It has as its objective the very purpose of the whole system-*to do justice*. Inefficiency drains the value of even a just result either by delay or excessive cost, or both.

It is time, therefore, to ask ourselves whether the tools of procedure, the methods of judicial process that developed slowly through the evolution of the common law, and were fitted to a rural, agrarian society, are entirely suited, without change, ***93** to the complex modern society of the late 20th and the 21st centuries.

III

Only when we see that some of the causes of the dissatisfaction of 1906 are still with us, and when we contemplate the enormous array of new problems that have accumulated and those yet to come do the dimensions of our problems emerge.

The topics selected for this conference will inevitably provoke cries that our objective is to reduce access to the courts. Of course, that is not the objective, for what we seek is the most satisfactory, the speediest and the least expensive means of meeting the legitimate needs of the people in resolving disputes. We must therefore open our minds to consideration of means and forums that have not been tried before. Even if what we have now has been tolerable for the first three-quarters of this century, there are grave questions whether it will do for the final quarter, or for the next century.

To illustrate, but by no means to limit, let me suggest some areas of concern to all Americans, whatever role they occupy in our society. In these areas we must probe for fundamental changes and major overhaul rather than simply "tinkering."

First: Ways must be found to resolve minor disputes more fairly and more swiftly than any present judicial mechanisms make possible. The late Edmund Cahn, of New York University, reminded us that few things rankle in the human breast like a sense of injustice. With few exceptions, it is no longer economically feasible to employ lawyers and conventional litigation processes for many "minor" or small claims, and what is "minor" is a subjective and variable factor. This means that there are few truly effective remedies for such everyday grievances as usury, shoddy merchandise, shoddy services on a TV, a washing machine, a refrigerator, or a poor roofing job on a home. This also means lawyers must reexamine what constitutes practice of law, for if lawyers refuse minor cases on economic grounds they ought not insist that only lawyers may deal with such cases.

It is time to consider a new concept that has been approached from time to time and has a background in other countries. To illustrate rather than propose, we could consider the value of a tribunal consisting of three representative citizens, or two nonlawyer citizens and one specially trained lawyer or paralegal, and vest in them final unreviewable authority to decide ***94** certain kinds of minor claims. Flexibility and informality should be the keynote in such tribunals and they should be available at a neighborhood or community level and during some evening hours.

Japan, for example, has only a fraction of the lawyers and judges we have per 100,000 population. In Japan, formal litigation is far less than in the United States, due to a long history of informal "community" and private processes for resolving disputes without litigation and, hence, without lawyers, judges and the attendant expense and delays.

Second: As the work of the courts increases, delays and costs will rise and the well-developed forms of arbitration should have wider use. Lawyers, judges and social scientists of other countries cannot understand our failure to make greater use of the arbitration process to settle disputes. I submit a reappraisal of the values of the arbitration process is in order, to determine whether, like the Administrative Procedure Act, arbitration can divert litigation to other channels.

Third: Ways must be found to simplify and reduce the cost of land title searches and related expenses of home purchasing and financing, in order to help offset the great rise in land and Construction costs that have created barriers to home ownership. With the developments in recent years, I can think of few things that are more likely "candidates" for use of modern computer technology than maintenance of land records and the process of examining land titles. Having spent some time in my early years of law practice in the musty, but cool, vaults of courthouses, manually and painstakingly charting out multiple transactions in a chain of title, and having now seen something of what a computer can do, I am persuaded that this is one area in which the legal profession should take the lead for a change that will reduce the cost of examining titles to a fraction of the present figures and releases lawyers for more useful tasks.

Fourth: Ways must be found to simplify and reduce the cost of transmitting property at death. Probate procedures can be simplified without diminishing certainty of title. As a native Minnesotan, I yield to the temptation to note that a wholesome step has been taken by the Minnesota Legislature in the form of a modern probate code, and although I must not let my loyalties lead me to say Minnesota has spoken the "last word" or that it has the "perfect" probate code, it has taken a significant step forward, typical of this progressive state.

***95** *Fifth*: Ways must be found to give appropriate weight to ecological and environmental factors without foreclosing development of needed public works and industrial expansion by inordinate delays in litigation. The accommodation of these conflicting values demands that there be a swift resolution of those cases, so as to avoid the waste involved in suspending execution of large projects to which vast public or private resources are committed. This country has appropriately committed itself to protecting our environment, but we must also build needed schools, homes, and roads, and in the process provide jobs.

Sixth: New ways must be found to provide reasonable compensation for injuries resulting from negligence of hospitals and doctors, without the distortion in the cost of medical and hospital care witnessed in the past few years. This is a high priority.

Seventh: New ways must be found to compensate people for injuries from negligence of others without having the process take years to complete and consume up to half the damages awarded. The workmen's compensation statutes may be a useful guide in developing new processes and essential standards.

Eighth: It is time to explore new ways to deal with such family problems as marriage, child custody and adoptions. We must see whether it is feasible to have relationships of such intimacy and sensitivity dealt with outside the formality and potentially traumatic atmosphere of courts.

Ninth: The 70 years since Pound criticized the "sporting theory of justice" have seen some major advances aimed at simplifying procedure at both the trial and appellate levels. Some state courts developed pretrial procedures in the 1920's. The adoption in 1938 of the Federal Rules of Civil Procedure was a major step toward a pervasive simplification of procedure. Here, my native Minnesota loyalties again prompt me to recall that one of the most distinguished lawyers ever to come out of Minnesota, William D. Mitchell, who was Solicitor General and later Attorney General of the United States, chaired the committee that drafted the Federal Rules of Civil Procedure. Now, however, after more than 35 years' experience with pretrial procedures, we hear widespread complaints that they are being misused and overused. Increasingly in the past 20 years, responsible lawyers have pointed to abuses of the pretrial processes in civil cases. The complaint is that ***96** misuse of pretrial procedures means that "the case must be tried twice." The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands.

The Judicial Conference of the United States has a standing committee on Rules and an Advisory Committee on Civil Rules. I have requested the Judicial Conference Standing Committee on Rules to conduct hearings on any proposals the

legal profession considers appropriate. We must have an obligation to provide all necessary legal services at the lowest reasonable cost, and when procedures become obsolete and increase the expense, they should be corrected.

This conference will not settle or solve problems, but we hope it will unsettle some of our assumptions that are no longer valid. Our objective is to stimulate future studies and conferences to treat in depth the unsatisfied needs we hope to identify in these next few days.

Ever since Magna Carta, common law lawyers have recognized that the law is a generative mechanism sharing with nature the capacity for growth and adaptation. The changes in seven and a half centuries since then demonstrate that change is a fundamental law of life and even our need for stability and continuity must yield to that immutable law. What is important is that lawyers fulfill their historic function as the healers of society's conflicts and fulfill their responsibility to preside over orderly evolution. It is now up to us to demonstrate whether we will be able to adapt the basically sound mechanisms of our system of laws to new conditions and abandon those that are obsolete.

Footnotes

1 Perloff, *The Future of the United States Government* (1971).

2 Another example of continuing a wasteful and judicially costly, but unnecessary, procedure is found in the three-judge district courts. They were useful and even necessary up to perhaps 20 years ago. They are not necessary today. They are a piston-engine form of litigation, outmoded in the jet age.

3 In October, November and December, 1975, the Washington, D.C. Police Department reported that of all the persons arrested on charges for serious crimes, 569 were at the time of arrest on release pending trial on a prior indictment. In the same period 402 persons arrested were, at the time, at liberty on parole, probation or conditional release from a penitentiary. Under the District of Columbia Code, §§ 23-1322-25, judges may take danger to the community into account.

4 And one of the founders of the NAACP.

ARE WE ASKING TOO MUCH OF OUR COURTS?

by SIMON H. RIFKIND [a1]

Of the New York Bar

When Roscoe Pound spoke from this podium seventy years ago, he chose as his title, “The Causes of Popular Dissatisfaction with the Administration of Justice.” [1] When this conference ***97** was convened, it was taken for granted that the same title could appropriately be used. Everyone knows that dissatisfaction with the administration of justice continues today. That should not surprise us-Pound termed such dissatisfaction as “old as the law.”

However, our ability to borrow Pound's title for our deliberations should not mislead us into the belief that we are looking at the same landscape. From my vantage point as a working trial lawyer, I venture the opinion that much of today's dissatisfaction springs not from failure but from conspicuous judicial success. The courts have been displaying a spectacular performance; it enjoys a constant “Standing Room Only” attendance. The cause of complaint is that the queues are getting too long. No problem seems to be beyond the desire of the American people to entrust to the courts; many litigants are clamoring for attention.

In consequence, there is a growing-and justified-apprehension that

(1) Quantitatively, the courts are carrying too heavy a burden-and probably a burden beyond the capability of mitigation by merely increasing the number of judges.

(2) Qualitatively, the courts are being asked to solve problems for which they are not institutionally equipped, or not as well equipped as other available agencies.

I do not perceive the role of the panelists-and certainly it is not my role-to invent or reveal the solutions to the problems facing the administration of justice. Rather, this is a place from which, as I perceive it, we are to be encouraged and stimulated to probe deeply-to question and to explore, and to create instruments for further probing and exploration. If we are successful, we shall have formulated an agenda for reform which will occupy our attention during the next decade.

Looking back at Pound's experience, I do not stretch my prophetic capacity too far when I suggest that we shall be fortunate if within the decade we uncover the answers. It will probably take even longer to put them into practice. In these sessions, let us hope that we can at least achieve orientation in a specified direction.

We can begin by seeking to determine whether the causes for dissatisfaction with the administration of justice have changed during the past seven decades. I believe that they have.

***98** Pound grouped the causes of dissatisfaction with the administration of justice under four headings-those common to any legal system, those lying in the peculiarities of the Anglo-American legal system, those lying in our judicial organization and procedure, and those lying in the environment of our judicial administration.

The cause of dissatisfaction which is most important today is a combination of Pound's second and fourth categories-the peculiarities of the Anglo-American legal system, as they find expression in the environment of our judicial administration.

It is quite easy to document support for the proposition that our courts have become the handymen of our society. The American public today perceives courts as jacks-of-all-trades, available to furnish the answer to whatever may trouble us: Shall we build nuclear power plants, and if so, where? Shall the Concorde fly to our shores? How do we tailor dismissal and lay-off programs during the depression, without undoing all of the progress achieved during prosperity by anti-discrimination statutes? All these are now the continuous grist of the judicial mills.

Thus, it is not surprising to learn that a lawsuit was recently filed in the Southern District of New York seeking to prevent the United States Postal Service from issuing a commemorative stamp honoring Alexander Graham Bell-on the grounds that someone else invented the telephone. [2]

It is equally easy to compile reports-both state and federal-attesting to the backbreaking burden which the courts are carrying. Students of the subject report that caseloads in both the federal and state courts are increasing at a pace far beyond the growth in population.

As far as I know, this aggravated condition is conspicuously a problem unique to this country. It is rooted partly in the litigious character of our citizenry, partly in the relative ease of access to the courts, and partly in the peculiar character of the American judge which readily distinguishes him from his European or Asiatic counterpart. Indeed, it distinguishes him from all judges who do not practice in the Anglo-American tradition. The American judge is a lawmaker, a commentator, an innovator to an extent not known in the countries which lack a legal system having roots in the common law. Personally, ***99** I have never heard a German, French, or Swiss lawyer speak of judge-made law.

These peculiarities, of course, may explain why judges and their work product play so conspicuous a role in American history, whereas they are almost invisible in the history of non-common law countries.

That also may explain the public readiness to look to judges-more than the legislature or executive-for solutions to public problems.

The brief description I have given of the American judge also explains why, as Judges Friendly and Leventhal have noted recently, [3] the burden is not capable of relief by addition of judges alone. Men and women capable of performing the judicial function-American style-are of limited supply. That rare combination of character, learning, experience, temperament, sagacity, and energy which compose an adequate judge does not occur in nature in abundance.

Moreover, if the judicial office is to attract people possessed of the qualities I have enumerated, it must be endowed with considerable prestige. The greater the number, the less the prestige. The less the prestige, the less the public respect, an essential ingredient of a satisfactory judicial system.

Judges and lawyers may be tempted to congratulate themselves upon the explosion of judicial business, and in fact to term it a sign of "public *satisfaction* with the administration of justice" [4] -and public dissatisfaction with the political branches of the government.

***100** But we would, of course, be myopic to engage in such self-adulation. The volume of business which the courts are being asked to carry is beyond their capacity. The result is long delays in the judicial process, and public dissatisfaction with the denial of justice that these delays import.

It is clear to me that one item on our agenda for the future must include efforts to lighten the workload of the courts if we are to eliminate public dissatisfaction with the administration of justice.

At this point, allow me to lay to rest some apprehension that I have heard expressed about the investigation launched by this conference. A large percentage of the increase in the business which has come into our courts in recent years has related to the protection of civil rights. That circumstance has generated a fear that this conference is conspiring to promote a counterrevolution; in the guise of an inquiry into whether the courts are being asked to do too much, and to do that for which they are ill-equipped, it is suggested we are seeking to erect an impassible barrier against the growing recognition of the rights of the accused, the voter, the consumer, the stockholder, the victims of racial and sexual discrimination; and indeed to reverse the generation-long movement for expansion of their rights.

Let me at once disengage myself from any such enterprise. The exploration of the Constitution, and discovery therein, progressively, of more commands for the humanization of our society have by no means run their course. Some scholars have suggested "that the judicial power is approaching the limits of its utility for major strategic innovation." [5] However, new rights-newly acknowledged and only recently enjoyed-will inevitably supply the pressure for judicial innovation to continue. If that momentum is to proceed without the artificial impediment of overladen courts, we must relieve the courts of burdens that do not require their special expertise.

Innovations of the future, whether the work-product of judges or legislators, will inevitably have to pass through courthouse strainers and filters. If these are clogged and stuffed, the passage is bound to be more sluggish, less reflective, and probably less sagacious.

***101** What I suggest is that the direction of our search should be guided by our view of our courts as institutions of last resort. We should require them to do nothing which other, less irreplaceable institutions can do as well, and, as far as possible, preserve the courts for doing that which cannot be done elsewhere.

There are two main routes we can take toward the goal of lightening the workload of the courts-substantive and procedural.

The most important method of proceeding along the substantive route is to address the question: Shall the courts continue to be not only the *dispute-resolvers*, but also the *problem-solvers* of our society?

Heretofore, the accepted model of an American court was that of an institution devoted to the resolution of disputes. It was the dispute which divided the parties. The object of the judicial intervention was to bring that dispute to an end by determining whether the plaintiff or the defendant prevailed. Many disputes, of course, did not run the whole gamut. They were abandoned, compromised or disposed of by means short of trial.

The adversary process is a well honed tool for use in such a contest. One of its greatest assets is a convention-the convention that one or the other party has the burden of proof with respect to particular issues. It is the allocation of the burden of proof which makes it possible to resolve all disputes and to leave none in limbo. If the party which bears the burden of proof fails, the other side prevails. One of the virtues of this system lies in the fact that the decision *directly* affects only the parties to the dispute. While indirectly it affects other similar disputes by the force of precedent or by the principle of stare decisis, that is not the same as the force of a judgment. The new case may differ in one or more of its facts, and thus be entitled to a trial, to a new evaluation and perhaps to a slightly or greatly revised formulation of the principle enunciated in the first. Each new decision is thus a small tile in a great mosaic, the design of which changes subtly and gradually and thus avoids the disasters which frequently overtake those who drive principles to the extreme end of their logical conclusions. I believe that this is at the heart of Justice Holmes' advice that experience, rather than logic, is the life of the law. [6]

***102** Problem-solving is an enterprise of a different sort altogether. The problem-solver finds no refuge in the burden of proof. He does not confine his edict to the parties before him. The consequences of his pronouncement of a solution cannot be confined to tile-sized changes. He frequently administers avulsive changes. Problem-solving is, thus, a chancy business requiring, in a democracy, not only wisdom and inventiveness but a keen perception of the political implications. Moreover, it imposes a duty upon the problem-solver to hear all those who have a significant interest in the problem. Very frequently the problem-solver tends to become a champion of a cause and not a neutral decider. His reward comes from popular acclaim, not from law review commendation. Despite this chasm which divides the problem-solver from the dispute-resolver, there is a growing tendency to confuse the two.

On the campuses, voices are heard which look benignly upon those areas of our jurisprudence wherein courts have become problem-solvers. This new role is projected as the wave of the future. Judges now preside at proceedings in which there is no clear alignment of parties but at which all who have a so-called significant interest may have their say, and indeed they should, since the decree will directly affect them by judgment and not by precedent. Judges, being human, are not averse to their enlarged role and expanded responsibility. It is exhilarating to administer relief to a universe of victims, and if some are unknown and unknowable, then to distribute largesse to the deserving by application of the *cy pres* doctrine in the fashion of Haroun Al-Rashid. [7] A gifted judge finds it a rewarding and self-fulfilling experience to write a prescription for the rehabilitation and pacification of a large strife-torn community. [8]

Recent history has recorded a number of brilliant judicial exploits in this area. Nevertheless, several questions perturb me.

***103** The first is the ancient question: *Quo warranto*? By what authority do judges turn courts into mini-legislatures? Confessedly, scholars may differ with respect to the answer.

The second question is less open to dispute. Is there anything in the traditional modes of judge selection which suggests the presence of aptitude for this kind of activity?

If we assume that among all the judges can be found the talents for this exacting role, is there any means of selection in the assignment of judges which can designate the peculiarly gifted judge for these particular problems in litigation?

Our country faces a great energy problem, a problem relating to the decay of our cities. The rising crime rate has all the earmarks of a revolutionary change in the patterns of our social behavior. The whole educational establishment is shaking with tremors of dissatisfaction and change. We have witnessed a sexual revolution, an enormous turnaround in public attitude in reference to the environment; one could go on and on.

Do we really believe that judges have any special aptitude which makes them suitable custodians of the responsibility for the solution of these problems? Is there anything in the judicial machinery which makes it a peculiarly suitable instrument for the study and resolution of such problems?

Indeed, it is traditional for Executive Commissions and Legislative Committees, assigned to a problem-solving mission, to reject the judicial format, to dispense with the rules of evidence, to shun the adversary process. This suggests that experience does not find these courtroom procedures helpful in problem-solving.

It is one thing for judges to decide bi-party controversies and, in so doing, pronounce principles which may contribute to the solution of the underlying problem, or sometimes unhappily become part of the problem. It is another for the courts to be burdened with the responsibility for the solution of the problems.

Our reflection, it seems to me, ought to address itself to the question whether the tether which holds the court to its classical role is getting too long so that the court is straying into the territory which more appropriately belongs to the Legislature, the Executive Commission, the Legislative Committee, or even to the academic self-selected task force.

To avoid the misconception that I am suggesting denial of access to the courts to those who feel that they have been denied ***104** statutory or constitutional rights, I should sharpen my point by explicit definition. So much depends on the perspective. In my perspective I see a great difference between the two roles. On one side, I see a court which tries to determine: was Jones unlawfully excluded from the University of State X, and which, having answered the question in the affirmative, fashions a decree designed to bring an end to the denial of the plaintiff's rights. On the other side, I see a court which, bidden or unbidden, undertakes to solve the problem of unequal education in State X.

In short, I am not at all sure that the courts have either the manpower, the talent, the tools or the authority to do the second.

We should be cautious, however, not to delude ourselves into thinking that our job is done if we remove "problem-solving" from the courts. In many of the cases in which courts have undertaken to solve problems that are more properly- and can be more effectively-dealt with elsewhere, they have done so by reason of the default of the legislatures and executives. *Baker v. Carr* [9] illustrates the point. There are many examples. In *Wyatt v. Stickney*, [10] Judge Johnson of the Middle District of Alabama placed virtually the entire state mental health system under the supervision of the Federal Court. But that decision was not motivated by the judge's desire to become a mental hospital administrator; it was compelled by the inaction of the state executive and legislature. If a judge must inspect the operating conditions of a prison, a hospital, or welfare office to determine whether constitutional, statutory, or common law rights are being invaded, what else can he do but perform his duty? And if he finds that rights are being abridged, what else can he do but seek to correct the abuses?

If we remove problem-solving from the courts, we will improve the administration of the *courts*. To improve the administration of *justice*, we must, in addition, change the manner in which the legislatures and executives respond to difficult social and political problems, so that very few will need to bring them to the courthouse door. The courts should not be the only place in which justice is administered.

***105** As additional steps along the substantive route to lighten the workload of the courts, I invite inspection of two types of judicial business, currently in the courts, which may be withdrawn: activities which do not warrant any government intervention and disputes which might better be resolved by another branch of government.

This inspection has to be animated by an awareness that our judicial resources are in very limited supply; that they are stretched thin; that their use in less appropriate situations is a denial of their use in more appropriate situations; that the conservation of the judicial resources has become an imperative necessity.

One guiding test for identifying cases in the first category-those which do not warrant use of the courts or any other government intervention-is whether the adversary system is the best means for their disposition.

The country is dotted with probate courts, a very large part of whose work is uncontested. Why employ judges as filing clerks? The British have developed a form of probate which deserves our emulation. In essence, wills are filed as deeds are in this country-and there are no court proceedings unless there is a disagreement among claimants. There is no need to impose the adversary system on persons who are not adversaries.

The uncontested divorce is theoretically not quite in the identical position. Many jurisdictions still look askance at divorce on demand, and require scrutiny. Why need that scrutiny be judicial? In many other jurisdictions, the judicial intervention is of trivial proportions. Perhaps it can be abolished, and judicial resources better applied.

The legislative branch might also be invited to reexamine the possibility of decriminalization of behavior now looked upon with tolerance in many jurisdictions. These include victimless crimes, such as drunkenness, prostitution, and gambling. If society in fact tolerates this behavior, then in a sense there is no adversity between the government prosecutor and the defendant.

There are several types of disputes now resolved in the courts which arguably might better be resolved by another branch of government.

The greatest consumer of judicial resources and energy is the personal injury lawsuit. Recent activity in the field of no-
***106** fault auto-insurance suggests that the nation is ready-or can be made ready-to treat the use of the automobile as involving widespread risks which can best be treated as a generalized cost of getting about in our society. The establishment of universal auto insurance and the dejudicialization of all personal injuries attributable to automobiles would change the character and climate of our courts. The question is simply one of timeliness: are the legislatures ready for it?

Years ago, it was realized that there was a better way to deal with industrial accidents than the judicial allocation of fault. The Workmen's Compensation laws recognized that injuries to workmen should be borne as a cost of operations, and their burden spread by insurance. These laws have spared the courts an enormous burden. However, some employees-notably seamen and railroad workers-are excluded from the coverage of Workmen's Compensation. If it were extended to them, a further burden would be removed from the courts. These are politically sensitive areas. But no one concerned with the burden on the courts can afford to overlook them.

We must also explore the procedural route to lessening the burdens on the courts. This route is, of course, one which has often been used both to keep certain business out of the courts and to guide other business through the courts. We have used a variety of gates to exclude some would-be litigators from the courthouse. Their names are well-known: case and controversy, standing, primary jurisdiction, exhaustion of remedies, amount in controversy.

What more can we do to keep out the worthless, the trivial, and those litigations which, by a definition not yet formulated, ought not to be in the courts?

Here, I confess that I am adrift on a sea of questions. It is possible to increase the price of admission to the courthouse; but that goes against our tradition of freedom of access to the courts without distinction by reason of wealth. We might increase the risks of litigation by following the English in imposing the expense of attorneys' fees on the losing party. Again, our history is opposed to it. In some cases, we might require posting a bond for costs. That has been tried, with modest success.

The difficulty with these proposals is that they may achieve exclusion for adventitious reasons.

It would seem to me that the higher threshold in front of the courthouse door should be built on the probable merit of ***107** the claim. That suggests the question whether it would be prudent to borrow from our criminal practice and require a civil litigant to show "probable merit" before he cranks into action the prodigious machinery of the judicial process.

Illustrative of this is the attempt, not fully refined, in the field of medical malpractice to screen claims by the use of mixed panels, including doctors. This is but one experiment in a field open to much innovation.

Further exploration might reveal whether the requirement for such a showing of merit would favorably affect the judicial burden.

One stage at which a requirement of showing probable merit might be especially useful is the point at which discovery is to begin. I believe it is fair to say that currently the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.

Unless my experience is unique, I hazard the opinion that such discovery proceeds with no attempt at serious regulation. If the threshold for admission to discovery were lifted so as to require a showing of probable merit, the flow of several classes of litigation would tend to diminish. Many actions are instituted on the basis of a hope that discovery will reveal a claim. To some extent, this is the result of the liberalized requirements of pleading, heralded at the beginning of this century, which reduced the requirements of the petition and left for discovery the opportunity to define the facts and issues. The theory was that this would prevent pleading from being a "game of skill" and prevent trials from becoming "sporting matches."[11] The practice-in many areas of the law-has been to make *discovery* the "sporting match" and an endurance contest. Is this a luxury which an overtaxed judicial system can afford?

The federal system has long recognized that a claim may be too small to warrant the attention of its courts. The states have not enjoyed this luxury. They have struggled with inferior courts and small claims courts. Is it possible to define a class of controversies, modest in amount, not very significant in principle, which need resolution for the peace and harmony of the community, but which do not need the courts? If so, can provision ***108** be made for the lay arbitration of such "neighborhood disputes." Refusal to have recourse to such extrajudicial tribunals might be so burdened as to make the arbitration almost compulsory.

Conversely, is it possible that some cases are too big for judicial action, and procedural limitations on the size of a case should be imposed?

By "too big", I mean that the trial format as we know it cannot accommodate itself to the requirements of the case. This incongruence may arise from excess in any number of dimensions. It may involve too many parties, or raise an excessive diversity of issues, or take too long to try.

In *United States v. IBM*, [12] now on trial in the Southern District of New York, the trial judge announced at the beginning that he expected to devote one year to trial and one year to decision. The government announced it would call 100 witnesses, and IBM said it would call 400. After nine months of trial and 25 government witnesses, the end is nowhere in sight. This is not a solitary example. [13]

I venture the guess that these dinosaur cases could have been translated into trials of normal magnitude if the rules left the litigators no choice. A trial is a medium of communication, and every such medium-whether it be a newspaper, a broadcast, or a play-has learned to accommodate itself to an effective size. Trials are no exception.

No matter how able the judge, are we wise to assign such enormous cases to the courts? What are the outer limits of size in numbers and duration? Is it "cranial capacity"? Must the record be so confined that it can be contained within a single cranium; that if it needs a computerized memory, it is no longer suitable for a judge or a jury? In *United States v. Dardi*, [14] a stock-manipulation case, the jury served 11 months. Does that constitute a trial?

***109** Cases of this dimension do not, in their present form, belong in the courts. We must either reduce them to a manageable size for the courts, or fashion another forum in our government to handle them.

We may also be able to find procedural devices which save time by changing the manner in which courts try cases. For example, many major patent cases these days have become involved in a three-faceted trial: (1) the validity of the patent and its infringement; (2) fraud on the patent office in its procurement, and (3) antitrust implications in the exploitation of the patent. A large number of cases become entangled in this tri-lateral complexity. If instead, the patent and infringement issues were tried first, the need to try the other issues might be eliminated, or the trial of those issues might be greatly simplified. Even if the court had to try three separate cases, it might take less time and effort than when the three issues are consolidated for one trial. Courts have taken similar steps in the past. For example, in 1947, the Supreme Court held in *Bruce's Juices, Inc. v. American Can Co.* [15] that a buyer, sued on an account, may not raise as a defense that the seller engaged in price discrimination in violation of the Robinson-Patman Act. The result was hardly compelled by the substantive law; it was, instead, the adoption of a procedural rule for allocating judicial resources.

Whatever procedural or substantive changes are made to alleviate the burden on the courts, there is one step that clearly must be taken. We must provide better methods for predicting, and providing for, the workload of the courts. In 1972, Chief Justice Burger suggested the preparation of a judicial impact statement when legislation is under consideration. [16] Congress has yet to act on this recommendation. Impact statements are indeed necessary-both so that Legislatures can think twice about enacting laws which will have an impact on the courts disproportionate to their social utility, and so that judges can be appointed in anticipation of the increased caseload-not years after the burden has become backbreaking. When any large housing project is planned, it is recognized that water mains and sewage lines must be installed to meet the new demand *before* the residents are in occupancy. Our legislatures should do the same in planning judicial services.

***110** I would take the suggestion one step further. Judicial impact statements should not be limited to assessing the effect of new legislation. Judicial decisions also have a tremendous impact on the workload of the courts. For example, the courts' increasing receptivity to civil rights actions under Section 1983 has added as many cases to the courts' caseload as any legislation enacted during the past several years. The Judiciary Committees of the Congress and state legislatures must not only monitor new legislation to determine its likely impact on the courts; they must also monitor the courts themselves to determine the impact of precedent-setting decisions on judicial caseloads.

The specific suggestions I have made are intended to be no more than illustrative; they are intended to suggest the areas of inquiry which I believe that we should pursue.

There is one additional goal which should guide us in this pursuit: we must move in the direction of simplification of the law. Nothing else will, in my opinion, materially ease the judicial burden. I believe it is a truism that the law is becoming excessively complex, excessively sophisticated, unduly mysterious. We all know that to be so in the field of taxes. After 50 years of practice, I would no more have the audacity to formulate my own tax return than I would engage in open heart surgery. I believe the same excessive complexities have entered the field of the securities laws, antitrust laws and many other areas of the law. This process of complication not only overburdens the courts, but makes the law less certain, more unpredictable. When law is so unpredictable that it ceases to function as a guide to behavior, it is no longer law. We have recognized this in the criminal law by stating that we will not punish persons for disobeying laws which are unduly vague. [17] In the civil law, we are forced to apply even vague laws to resolve disputes between private litigants, but the process carries an enormous cost in judicial energy and an even greater cost in lessened respect for both the courts and the law. If we do not stop this process of complication, we shall have to evolve into marsupials, so that each of us will then be able to carry in his pouch not the ancient *vade mecum* but a live and active lawyer in order to keep out of trouble.

a1 Acknowledgement is made of the assistance given by Richard M. Zuckerman, Esq.

1 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 Am.L.Rev. 729 (1906), 35 F.R.D. 273.

2 *See* "Suit to Bar Stamp Denies Bell Invented Telephone", *New York Times*, February 27, 1976, page 35, column 3.

3 Judge Friendly wrote in his *Federal Jurisdiction: A General View* (1973) that
there must come a point when an increase in the number of judges makes judging, even at the trial level, less prestigious and less attractive. Prestige is a very important factor in attracting highly qualified men to the federal bench from much more lucrative pursuits. Yet the largest district courts will be in the very metropolitan areas where the discrepancy between uniform federal salaries and the financial rewards of private practice is the greatest, and the difficulty of maintaining an accustomed standard of living on the federal salary the most acute. There is real danger that in such areas, once the prestige factor was removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice.
Id. at 29-30. Judge Leventhal, in reviewing the book, expressed his agreement. *See* Harold Leventhal, Review of *Federal Jurisdiction: A General View* (by Henry J. Friendly) (1973), 75 Col.L.Rev. 1009 (1975).

4 A recent public opinion poll found that 26 percent of adult Americans had "a great deal of confidence" in the U.S. Supreme Court-but that only 13 percent had a "great deal of confidence" in Congress or the Executive Branch. The Harris Survey, "Record Lows in Public Confidence", released October 6, 1975.

5 Charles L. Black, Jr., Review of *The Role of the Supreme Court in American Government* (by Archibald Cox) (1976), New York Times Book Review, February 29, 1976 at 23.

6 Oliver Wendell Holmes, *The Common Law* (1881).

7 *See* Note, "Damage Distribution in Class Actions: The Cy Pres Remedy," 39 U.Chi.L.Rev. 448 (1972); Michael Malina, "Fluid Class Recovery as a Consumer Remedy in Antitrust Cases," 47 N.Y.U.L.Rev. 477 (1972); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 333 F.Supp. 278 (S.D.N.Y.1971), *modified* 333 F.Supp. 291 (S.D.N.Y.1971), *mandamus denied sub nom. Pfizer v. Lord*, 449 F.2d 119 (2d Cir.1971); *Bebchick v. Public Utilities Commission*, 115 U.S.App.D.C. 216, 318 F.2d 187 (D.C.Cir.1963), *cert. denied*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963).

8 *See, e.g.*, Judge Weinstein's sweeping order relating to school desegregation in Coney Island in *Hart v. Community School Board*, 383 F.Supp. 699 (E.D.N.Y.1974), *appeal dismissed for lack of appealable order*, 497 F.2d 1027 (2d Cir.1974), 383 F.Supp. 769 (E.D.N.Y.1974), *aff'd*, 512 F.2d 37 (2d Cir.1975).

9 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

10 344 F.Supp. 373, 344 F.Supp. 387 (M.D.Ala.1972), *enforcing* 325 F.Supp. 781, 334 F.Supp. 1341 (M.D.Ala.1971), *aff'd in part, remanded in part, decision reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir.1974).

11 *See Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

12 69 Civ. 200 (S.D.N.Y.)

13 In *United States v. Arkansas Fuel Oil Corp.*, 1960 Trade Cas. ¶ 69,619 (N.D.Okl.1960), I was one of 84 lawyers. What might have been turned into a shambles was saved by a judge of extraordinarily high quality and by the willingness of the defendants to allow committees to manage certain aspects of the case for them. In *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir.1945, per Learned Hand), the complaint named 63 defendants.

14 330 F.2d 316 (2d Cir.1963), *cert. den.*, 379 U.S. 845, 85 S.Ct. 50, 13 L.Ed.2d 50, 379 U.S. 869, 85 S.Ct. 117, 13 L.Ed.2d 73 (1964). On appeal, the defendants argued, unsuccessfully, that the length of the trial alone constituted a denial of a fair trial. 330 F.2d at 329.

15 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947).

16 Warren Burger, "The State of the Federal Judiciary-1972", 58 A.B.A.J. 1049, 1050 (1972); "Report on the Problems of the Judiciary," 92 S.Ct. 2923, 2925.

17 *See generally* Note, "The Void-for Vagueness Doctrine in the Supreme Court," 109 U.Pa.L.Rev. 67 (1960).

*111 VARIETIES OF DISPUTE PROCESSING

by FRANK E.A. SANDER [a2]

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Last year, in an article entitled "Behind the Legal Explosion", published in the Stanford Law Review, [1] Professor John Barton pointed out that if federal appellate cases continued to grow for the next 40 years at the same rate at which they have grown during the last decade, then by the year 2010 we can expect to have well over one million federal appellate cases each year, requiring five thousand federal appellate judges to decide them and one thousand new volumes of the Federal Reporter each year to report the decisions. Since the number of cases initiated in the federal system each year is approximately ten times the number of decided appeals, one can readily extrapolate Professor Barton's projections to the trial level. And if one keeps in mind that in the State of California alone about four times as many actions are commenced each year as are commenced in the entire federal system, one begins to get some sense of the magnitude of the total problem. [2]

But I believe that one should view these dire predictions with a healthy skepticism. Litigation rates, like population rates, cannot be assumed to grow ineluctably, unaffected by a variety of social factors. [3] Nor should it be assumed that there will be no human intervention that could dramatically affect the accuracy of Professor Barton's projections.

Thus one concern to which we ought to address ourselves here is how we might escape from the specter projected by Professor Barton. This might be accomplished in various ways. First, we ***112** can try to prevent disputes [4] from arising in the first place through appropriate changes in the substantive law, such as the adoption of a no-fault principle for automobile injuries or the removal of a criminal sanction for certain conduct. [5] A less obvious substantive law issue that may have a bearing on the extent of litigation that arises is whether we opt for a discretionary rule or for one that aims to fix more or less firmly the consequences that will follow upon certain facts. For example, if a statute says that marital property on divorce will be divided in the court's discretion there is likely to be far more litigation than if the rule is, as in the community property states, that such property will normally be divided 50-50. I wonder whether legislatures and law revision commissions are sufficiently aware of this aspect of their work.

Another method of minimizing disputes is through greater emphasis on preventive law.[6] Of course lawyers have traditionally devoted a large part of their time to anticipating various eventualities and seeking, through skillful drafting and planning, to provide for them in advance. But so far this approach has been resorted to primarily by the well-to-do. I suspect that with the advent of prepaid legal services this type of practice will be utilized more widely, resulting in a probable diminution of litigation.

A second way of reducing the judicial caseload is to explore alternative ways of resolving disputes outside the courts, and it is to this topic that I wish to devote my primary attention. By and large we lawyers and law teachers have been far too single-minded when it comes to dispute resolution. Of course, as pointed out earlier, good lawyers have always tried to prevent disputes from coming about, but when that was not possible, we have tended to assume that the courts are the natural and obvious dispute resolvers. In point of fact there is a rich variety ***113** of different processes, which, I would submit, singly or in combination, may provide far more "effective" conflict resolution.[7]

Let me turn now to the two questions with which I wish to concern myself:

> 1) What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?
>
> 2) How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?

One consequence of an answer to these questions is that we will have a better sense of what cases ought to be left in the courts for resolution, and which should be "processed"[8] in some other way. But since this inquiry essentially addresses itself to developing the most effective method of handling disputes it should be noted in passing that one by-product may be not only to divert some matters now handled by the courts into other processes but also that it will make available those processes for grievances that are presently not being aired at all. We know very little about why some individuals complain and others do not, or about the social and psychological costs of remaining silent.[9] It is important to realize, however, that by establishing new dispute resolution mechanisms, or improving existing ones, we may be encouraging the ventilation of grievances that are now being suppressed. Whether that will be good (in terms of supplying a constructive outlet for suppressed anger and frustration) or whether it will simply waste scarce societal resources (by validating grievances that might otherwise have remained dormant) we do not know. The important thing to note is that there is a clear trade-off: the price of an improved scheme of dispute processing ***114** may well be a vast increase in the number of disputes being processed.

The Range of Available Alternatives

There seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society.[10] Much as the police have been looked to to "solve" racial, school and neighborly disputes, so, too, the courts have been expected to fill the void created by the decline of church and family. Not only has there been a waning of traditional dispute resolution mechanisms, but with the complexity of modern society, many new potential sources of controversy have emerged as a result of the immense growth of government at all levels,[11] and the rising expectations that have been created.

Quite obviously, the courts cannot continue to respond effectively to these accelerating demands. It becomes essential therefore to examine other alternatives.

The chart reproduced below attempts to depict a spectrum of some of the available processes arranged on a scale of decreasing external involvement. [12]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

At the extreme left is adjudication, the one process that so instinctively comes to the legal mind that I suspect if we ***115** asked a random group of law students how a particular dispute might be resolved, they would invariably say "file a complaint in the appropriate court." Professor Lon Fuller, one of the few scholars who has devoted attention to an analysis of the adjudicatory process, has defined adjudication as "a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor." [13] Although he places primary emphasis on process, I would like for present purposes to stress a number of other aspects-the use of a third party with coercive power, the usually "win or lose" nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties. Although mediation or conciliation [14] also involves the use of a third party facilitator (and is distinguished in that regard from pure negotiation), a mediator or conciliator usually has no coercive power and the process in which he engages also differs from adjudication in the other two respects just mentioned. Professor Fuller puts this point well when he refers to "the central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." [15]

Of course quite a variety of procedures fit under the label of adjudication. Aside from the familiar judicial model, there is arbitration, and the administrative process. Even within any one of these, there are significant variations. Obviously there are substantial differences between the Small Claims Court and ***116** the Supreme Court. Within arbitration, too, although the version used in labor relations is generally very similar to a judicial proceeding in that there is a written opinion and an attempt to rationalize the result by reference to general principles, in some forms of commercial arbitration the judgment resembles a Solomonic pronouncement and written opinions are often not utilized. Another significant variant is whether the parties have any choice in selecting the adjudicator, as they typically do in arbitration. Usually a decision rendered by a person in whose selection the parties have played some part will, all things being equal, be less subject to later criticism by the parties.

There are important distinctions, too, concerning the way in which the case came to arbitration. There may be a statute (as in New York and Pennsylvania) requiring certain types of cases to be initially submitted to arbitration (so-called compulsory arbitration). More commonly arbitration is stipulated as the exclusive dispute resolution mechanism in a contract entered into by the parties (as is true of the typical collective bargaining agreement and some modern medical care agreements). In this situation the substantive legal rules are usually also set forth in the parties' agreement, thus giving the parties control not only over the process and the adjudicator but also over the governing principles.

As is noted on the chart, if we focus on the indicated distinctions between adjudication and mediation, there are a number of familiar hybrid processes. An inquiry, for example, in many respects resembles the typical adjudication, but the inquiring officer (or fact finder as he is sometimes called) normally has no coercive power; indeed, according to Professor Fuller's definition, many inquiries would not be adjudication at all since the parties have no right to any agreed-upon form of presentation and participation.

But a fact finding proceeding may be a potent tool for inducing settlement. Particularly if the fact finder commands the respect of the parties, his independent appraisal of their respective positions will often be difficult to reject. This

is especially true of the Ombudsman who normally derives his power solely from the force of his position. [16] These considerations ***117** have particular applicability where there is a disparity of bargaining power between the disputants (e.g., citizen and government, consumer and manufacturer, student and university). Although there may often be a reluctance in these situations to give a third person power to render a binding decision, the weaker party may often accomplish the same result through the use of a skilled fact finder.

There are of course a number of other dispute resolution mechanisms which one might consider. Most of these (e.g., voting, coin tossing, self-help) are not of central concern here because of their limited utility or acceptability. But one other mechanism deserves brief mention. Professor William Felstiner recently pointed out that in a "technologically complex rich society" avoidance becomes an increasingly common form of handling controversy. He describes avoidance as "withdrawal from or contraction of the dispute-producing relationship" (e.g., a child leaving home, a tenant moving to another apartment, or a businessman terminating a commercial relationship). He contends that such conduct is far more tolerable in modern society than in a "technologically simple poor society" because in the former setting the disputing individuals are far less interdependent. [17] But, as was pointed out in a cogent response by Professors Danzig and Lowy, there are heavy personal and societal costs for such a method of handling conflicts, [18] and this strongly argues for the development of some effective alternative mechanism. Moreover, even if we disregarded altogether the disputes that are presently being handled by avoidance-clearly an undesirable approach for the reasons indicated-we must still come to grips with the rising number of cases that do presently come to court and see whether more effective ways of resolving some of these disputes can be developed.

The preceding brief appraisal of the various primary processes is misleading in its simplicity, for of course rarely do the processes occur in isolation. Often adjudication involves an ***118** element of conciliation. Professor Stewart Macaulay describes an interesting example of such a situation in his analysis of the Wisconsin Department of Motor Vehicles' activities in monitoring the relationship between automobile franchisors and franchisees. Although the Department's only formal responsibility was whether to hold hearings with a view to possible revocation of the franchise, in fact the intervention of the Department served a mediative role by compelling each party to consider seriously the contentions of the other party, and hence led to settlement in a great number of cases. [19] Similarly, as already pointed out, fact finding may very closely resemble adjudication. Moreover when we look at the way the various processes occur in particular institutions, there is often an elaborate interplay of the individual mechanisms. For example, a grievance under a collective bargaining agreement is usually first sought to be negotiated. If the parties cannot settle the case they go to arbitration, but the arbitrator may first seek to mediate the case. Finally there may be an attempt to review the arbitrator's decision in the courts.

Criteria

Let us now look at some criteria that may help us to determine how particular types of disputes might best be resolved.

1. Nature of Dispute

Lon Fuller has written at some length about "polycentric" problems that are not well suited to an adjudicatory approach since they are not amenable to an all-or-nothing solution. He cites the example of a testator who leaves a collection of paintings in equal parts to two museums. [20] Obviously here a negotiated or mediated solution that seeks to accommodate the desires of the two museums is far better than any externally imposed solution. Similar considerations may apply to other allocational tasks where no clear guidelines are provided.

At the other extreme is a highly repetitive and routinized task involving application of established principles to a large number of individual cases. Here adjudication may be appropriate, but in a form more efficient than litigation (e.g., an

administrative agency). Particularly once the courts have established the basic principles in such areas, a speedier and less cumbersome procedure than litigation should be utilized.

***119** In the field of divorce, for example, although we still cling to the myth that consent divorce is unacceptable, we are gradually coming closer and closer to that reality. Under no-fault statutes the issue typically is whether the parties have lived apart for a stipulated period or whether there has been a breakdown of the marriage. The former question is clearly one that a clerk can determine. And although an issue like breakdown appears at first to be a typically justiciable question, it has become apparent that short of conducting a very probing inquest of the marriage of the kind that would be very time consuming and that would most likely transgress one's sense of the proper limits of the state's right to intervene in the privacy of married life, there is no ready alternative but to take the word of the principal parties to the marriage. Indeed, if the parties disagree over whether the marriage has broken down, that in itself is prima facie evidence of breakdown. [21] Thus here is one sphere of litigation that could readily be relegated to a ministerial official, as has long been the case in Japan. More recently somewhat similar steps have been taken in England.

With respect to many problems, there is a need for developing a flexible mechanism that serves to sort out the large general question from the repetitive application of settled principle. I do not believe that a court is the most effective way to perform this kind of sifting task. In Sweden, in the consumer field, there is a Public Complaints Board which receives individual consumer grievances. Initially the Board performs simply a mediative function, utilizing standards set up by the relevant trade organizations. If initial settlement is impossible, the Board issues a non-binding recommendation to both parties, which often leads to subsequent settlement. Failing that, the grievant can sue in the newly established Small Claims Court. But another aspect of its activities is to seek to discern certain recurring issues and problems that should be dealt with by legislation or regulation. [22]

***120** Perhaps a word should also be said about courts undertaking some of the complex and unorthodox tasks that they have recently been called upon to undertake. Without going into the question of legitimacy, I am not persuaded that the courts have sufficient competence, resources or remedial power to run mental hospitals, schools or welfare departments. Yet where serious constitutional denials are at issue, they can hardly decline jurisdiction. This seems to me an area where one can make no headway without talking about very specific cases and exploring in detail alternative dispute resolution mechanisms. Clearly additional research needs to be done on this subject. [23]

2. Relationship Between Disputants

A different situation is presented when disputes arise between individuals who are in a long-term relationship than is the case with respect to an isolated dispute. In the former situation, there is more potential for having the parties, at least initially, seek to work out their own solution, for such a solution is likely to be far more acceptable (and hence durable). Thus negotiation, or if necessary, mediation, appears to be a preferable approach in the first instance. Another advantage of such an approach is that it facilitates a probing of conflicts in the underlying relationship, rather than simply dealing with each surface symptom as an isolated event.

Consider, for example, a case such as might be heard in the recently established mediation session of the Dorchester (Massachusetts) District Court. A white woman (Mrs. W.) has filed a criminal complaint for assault against her black neighbor (Mrs. B.). The facts, as they emerge at the mediation session, are that Mrs. W. has for some time gratuitously taken care of Mrs. B.'s two young children so that Mrs. B. can go to work. On the day in question one of the B. children for the second time in a row broke the expensive eyeglasses of one of the W. children, and had been generally out of control. Mrs. W., having reached the end of her rope, struck the child. When Mrs. B. heard about this, she marched over to Mrs. W. and hit her. Mrs. W. thereupon filed a criminal complaint.

***121** Fortunately the Dorchester District Court, like a number of other courts around the country,[24] has a program under which, if the clerk or judge deems the case appropriate, and the two parties are willing, the case can be referred to a panel of three trained mediators drawn from the local community. The panel will attempt to let each of the disputants fully state her side of the story, and then, through skillful probing, will seek to elicit points of tension in the underlying relationship (here, the increasing sense of exploitation felt by Mrs. W. as an arrangement deemed temporary became long-term). Finally, the mediators will attempt to work out an agreement which seeks to alleviate the long-run tensions as well as resolve the immediate controversy (here, for example, that Mrs. B. might agree to work with the social service component of the mediation project to try to find some alternative child care arrangement, and that she would pay five dollars per month to reimburse Mrs. W. for the broken glasses). Such a solution (unlike the aborted criminal adjudication) would most likely be acceptable to both parties; more significantly, it would have a therapeutic effect on the long-term relationship between these two individuals because it would permit them to ventilate their feelings, and then help them to restructure their future relationship in a way that met the expectations of both parties. In addition it would teach them how they might themselves resolve future conflicts. Thus there is a strong likelihood that future disputes would be avoided, or at least minimized.

Of course, it might be suggested that a court could also induce such a settlement. But quite aside from the unlikelihood of a busy court being able to create a climate that encourages the disputants to ventilate their underlying grievances, there is a world of difference between a coerced or semi-coerced settlement of the kind that so often results in court and a voluntary agreement arrived at by the parties.

A similar approach would appear to be feasible in a number of other areas. The grievance procedure under the typical collective bargaining agreement is based on a similar premise, in that it usually provides first for attempts to settle the dispute at the ***122** lower levels, and only then calls for an adjudicatory proceeding (arbitration) at the end of the line if the prior steps do not lead to settlement. However one difficulty is that, perhaps for reasons of economy, there is usually no mediator at the lower levels. Hence, if the parties have become too entrenched in their respective positions, there is little effective communication between them, and the early stages of the grievance procedure are often simply rote steps to be gone through before getting to arbitration. And while the arbitrator can then seek to play a mediational role, as is done by some arbitrators provided the parties give their consent,[25] there is an obvious difficulty if the mediator-arbitrator is unsuccessful in his mediational role and then seeks to assume the role of impartial judge.[26] For effective mediation may require gaining confidential information from the parties which they may be reluctant to give if they know that it may be used against them in the adjudicatory phase. And even if they do give it, it may then jeopardize the arbitrator's sense of objectivity. In addition it will be difficult for him to take a disinterested view of the case-and even more so to *appear* to do so-after he has once expressed his views concerning a reasonable settlement.

Another long-term (at least sometimes) relationship that may be amenable to this type of dispute resolution mechanism is the family. Japan has long had a successful system of family conciliation tribunals, and although one must be necessarily wary in looking to entirely different cultures, it may well be that as our courts are beginning to play less and less of a role in divorce, as a result of the pervasive adoption of no-fault statutes, a need arises for some new flexible instrument-clearly not a court-that will concern itself with the resolution of family conflicts.

To be sure we have had a traditional aversion to judicial involvement in the going family, except where it is compelled by considerations of health or safety.[27] But I wonder whether that policy is not traceable to the coercive quality of the typical adjudicative intervention, rather than to a notion that the family must inevitably be left to struggle with its own internal conflicts. ***123** Of course in a sense we have developed a mediative solution for most family conflict-social work and family therapy. Still where there is a breakdown of the family as a result of death or divorce, the courts have customarily become involved and it is here that alternative dispute resolution devices-particularly mediation-need to be further explored.[28]

In the field of corrections, an interesting new program was recently begun at the Karl Holton facility in Stockton, California by the California Youth Authority working in collaboration with the Center for Correctional Justice and the Institute of Mediation and Conflict Resolution. Instead of utilizing the usual authority-dominated grievance procedure, the drafters opted for what they called "the mediation approach." [29] It consists at the first level of a five person committee, one of whom (a middle management official) acts as Chairman, the other four being voting members-two inmates and two staff members. Review of the decision-or of the opposing views in case there is a tie-by the director of the facility or his delegate is then provided for, and finally recourse can be had to an outside independent three-person review board set up under the auspices of the American Arbitration Association. The decision of this board is only advisory, but the director of the facility must promptly indicate whether he will comply with it, and if not, to state his reasons for not doing so. Thus while the ultimate power of decision remains in the person in charge, aggrieved individuals are given maximum opportunity first to air their views freely in a mediational context and then, if that fails, to have their views presented for evaluation by a disinterested outsider.

Initial experience under this process is revealing. In contradistinction to the polarization that might have been expected ***124** at the initial level where two inmates are pitted against two officials, in only 10 out of the first 212 cases did the first step grievance committee result in a 2-2 tie. In all other cases a majority decision resulted. Moreover recent research suggests that the presence of a viable grievance mechanism is a significant factor in preventing prison riots. [30]

Such an internalized grievance procedure, with limited last resort recourse to outside agencies, would appear to hold great promise for many disputes within an ongoing institution, such as a school, a welfare department, or a housing development. In view of the multifaceted nature of this type of grievance process, one might hope that if a case following such a procedure subsequently came to court, the court would give great, if not conclusive, weight to the prior determinations. [30a]

3. Amount in Dispute

Although, generally speaking, we have acted to date in a fairly hit-or-miss fashion in determining what problems should be resolved by a particular dispute resolution mechanism, amount in controversy has been an item consistently looked to to determine the amount of process that is "due". The Small Claims Court movement has taken as its premise that small cases are simple cases and that therefore a pared-down judicial procedure was what was called for. Next to the juvenile court, there has probably been no legal institution that was more ballyhooed as a great legal innovation. Yet the evidence now seems overwhelming that the Small Claims Court has failed its original purpose; that the individuals for whom it was designed have turned out to be its victims. [31] Small wonder when one considers the lack of rational connection between amount in controversy and appropriate process. Quite obviously a small case may be complex, just as a large case may be simple. The need, according to a persuasive recent study, is for a preliminary investigative-conciliational stage (which could well be administered by a lay individual or paraprofessional) with ultimate recourse to the court. This ***125** individual could readily screen out those cases which need not take a court's time (e.g., where there is no dispute about liability but the defendant has no funds), and preserve the adjudicatory process for those cases where the issues have been properly joined and there is a genuine dispute of fact or law. Obviously such a screening mechanism is not limited in its utility to the Small Claims Court. [32]

4. Cost

There is a dearth of reliable data comparing the costs of different dispute resolution processes. Undoubtedly this is due in part to the difficulty of determining what are the appropriate ingredients of such a computation. It may be relatively easy to determine the costs of an ad hoc arbitration (though even there one must deal with such intangibles as the costs connected with the selection of the arbitrator(s)). But determining the comparable cost of a court proceeding would

appear to pose very difficult issues of cost accounting. [33] Even more difficult to calculate are the intangible "costs" of inadequate (in the sense of incomplete and unsatisfactory) dispute resolution. Still, until better data become available one can probably proceed safely on the assumption that costs rise as procedural formalities increase.

The lack of adequate cost data is particularly unfortunate with respect to essentially comparable processes, such as litigation and arbitration. Assuming for the moment that arbitration would produce results as acceptable as litigation-a premise that is even more difficult to verify-would cost considerations [34] justify the transfer (at least in the first instance) of entire categories of civil litigation to arbitration, as has been done in some jurisdictions for cases involving less than a set amount of money? One difficulty in this connection is that we have always considered ***126** access to the courts as an essential right of citizenship for which no significant charge should be imposed, while the parties generally bear the cost of arbitration. Thus although I believe, on the basis of my own arbitration experience, that that process is, by and large, as effective as and cheaper than litigation, lawyers tend not to make extensive use of it (outside of special areas such as labor and commercial law), in part because it is always cheaper for the clients to have society rather than the litigants pay the judges. [35] Perhaps if arbitration is to be made compulsory in certain types of cases because we believe it to be more efficient, then it should follow that society should assume the costs, unless that would defeat the goal of using costs to discourage appeals. [36] I will have more to say about this subject later.

5. Speed

The deficiency of sophisticated data concerning the costs of different dispute resolution processes also extends to the factor of speed. Although it is generally assumed [37] -rightly, I believe-that arbitration is speedier than litigation, I am not aware of any studies that have reached such a conclusion on the basis of a controlled experiment that seeks to take account of such factors as the possibly differing complexity of the two classes of cases, the greater diversity of "judges" in the arbitration group, and the possibly greater cooperation of the litigants in the arbitration setting.

Implications

1. At one time perhaps the courts were the principal public dispute processors. But that time is long gone. With the development of administrative law, the delegation of certain problems to specialized bodies for initial resolution has become a commonplace. Within the judicial sphere, too, we have developed specialized courts to handle family problems and tax problems, among others.

***127** These were essentially *substantive* diversions, that is, resort to agencies having substantive expertise. Perhaps the time is now ripe for greater resort to an alternate primary *process*. As I have indicated earlier, such a step would be particularly appropriate in situations involving disputing individuals who are engaged in a long-term relationship. The process ought to consist initially of a mediational phase, and then, if necessary, of an adjudicative one. [38] Problems that would appear to be particularly amenable to such a two-stage process are disputes between neighbors, family members, supplier and distributor, landlord and tenant. [39] Where there is an authority relationship between the parties (such as exists between prisoner and warden or school and student) special problems may be presented, but, as indicated earlier, such relationships, too, are, with some adjustments, amenable to a sequential mediation-adjudication solution. [40]

Receptivity to such an alternate primary process imposes special obligations on the Bar. Although we know relatively little about the participation of lawyers in conciliational processes, it is possible that there will be a lesser role for lawyers in this new world. Perhaps this simply calls for more diverse training in the law schools, but in the first instance it also poses a test to the Bar of its capacity to support innovative experimentation despite a temporary adverse economic impact for the profession. [41]

***128** As regards the nature of the adjudicative tribunal, we should give strong consideration to greater use of arbitration, particularly where we are dealing with specialized issues or issues whose confines have been fairly well chartered out by a contract between the parties, by governing legislation or by prior court decision. [42]

2. Although others more competent will be addressing themselves more directly to criminal adjudication, I am impressed by the experimental work that has been undertaken under the auspices of the Law Enforcement Assistance Administration (LEAA) to divert certain types of minor criminal offenses (e.g., ones like the case earlier described between Mrs. B. and Mrs. W.) to a mediational proceeding. Such a process readily fits under the general rubric described in the immediately preceding section; but it can also be seen in the larger context of a movement towards a community "moot", offering informal and supportive services to community members. [43] Such institutions of course have a rich anthropological heritage. [44] Whether, in our alienated and divisive society, these institutions are hopelessly out of place, or whether they represent the last hope of a regained sense of community, remains to be seen. [45]

3. While the mediation-arbitration model earlier referred to is one useful format for processing certain types of cases, another device that bears further utilization is what might be called the ***129** screening-adjudication model. I have already made reference to this in connection with the discussion of Small Claims Courts, and in a sense it might be argued that what I am describing is but another name for pretrial. But, as indicated earlier, there is a considerable difference between a judicial suggestion that the case ought to be settled for $X, and a quick preliminary "costing out" or "screening out" by a separate body. [46]

One interesting example is the Massachusetts statute recently enacted for medical malpractice cases, [47] under which the plaintiff must first go before a three-person Board made up of a doctor, lawyer and trial judge. If the Board finds that the case does not have prima facie merit the plaintiff must put up a bond for the defendant's costs before he can go forward in court. Whether this statute has its intended effect may well turn on the adequacy of the bond, which normally is specified at the figure of $2000. [48] Perhaps we need to give much more serious consideration to whether we should not go much further in taxing the loser with the full costs, including attorneys' fees. [49] Of course this is a complex question, and one needs to be careful to avoid giving a litigant a free ride on the system without barring legitimate claims of financial grounds. But it seems fairly clear that we have not yet hit the optimal note in making the system more cost-responsive, so that a litigant will carefully weigh whether he should go onto to the next phase of the dispute processing system.

***130** Another interesting experiment along these lines is the so-called Michigan Mediation System. [50] Here a three-person panel made up of a member of the plaintiff's bar (selected by the bar association), a member of the defendant's bar, and a trial judge sit together as a panel for a period of two weeks to hear primarily tort cases in which the liability is acknowledged but there is dispute about the damages. The panel first reads such documentary evidence as there is and then discusses each case with the lawyers for the parties for about half an hour; no oral evidence is allowed. The Board then indicates what it believes the case is worth. If the case is not settled for this sum, then the plaintiff must receive at least 110% of this sum in order to avoid being taxed for the costs of trial (at a stipulated sum set so as to include a figure for attorneys' fees); the defendant must pay a similar fee if he does not settle and the recovery is more than 90% of the amount set by the mediation panel.

This approach, though promising, was criticized by the Chairman of the recently established Litigation Management and Economics Committee of the A.B.A. Section on Litigation on the ground that it comes too late in the process, after "considerable pre-trial and discovery expense has already been incurred." He suggests instead a program of mandatory arbitration for certain classes of cases, such as those involving claims of $25,000 or less. To avoid an overly rigid application of arbitration to cases for which another dispute resolving mechanism might be more suitable, he proposes that the mandatory feature would be waived upon a showing that another process would offer a more "fair and efficient

adjudication of the controversy." "Conversely, arbitration could be required in those cases exceeding the jurisdictional limit of mandatory arbitration upon a showing that arbitration would be a more fair and efficient method of resolving the controversy." [51] This is an innovative and promising suggestion that deserves careful study.

4. What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases ***131** being assigned to differing processes (or combinations of processes), according to some of the criteria previously mentioned. Conceivably such allocation might be accomplished for a particular class of cases at the outset by the legislature; that in effect is what was done by the Massachusetts legislature for malpractice cases. Alternatively one might envision by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room directory in the lobby of such a Center might look as follows:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6
Ombudsman	Room 7

Of one thing we can be certain: once such an eclectic method of dispute resolution is accepted there will be ample opportunity for everyone to play a part. Thus a court might decide of its own to refer a certain type of problem to a more suitable tribunal. [52] Or a legislature might, in framing certain substantive rights, build in an appropriate dispute resolution process. [53] Institutions such as prisons, schools, or mental hospitals also could get into the act by establishing indigenous dispute resolution processes. Here the grievance mechanism contained in the typical collective bargaining agreement stands as an enduring example of a successful model. Finally, once these patterns begin to take hold, the law schools, too, should shift from their preoccupation ***132** with the judicial process and begin to expose students to the broad range of dispute resolution processes. [54]

5. I would be less than candid if I were to leave this idyllic picture without at least brief reference to some of the substantial impediments to reform in this area. To begin with there is always the deadening drag of status quoism. But I have reference to more specific problems. First, particularly in the criminal field, cries of "denial of due process" will undoubtedly be heard if an informal mediational process is sought to be substituted for the strict protections of the adversary process. [55] In response to this objection it must be asserted candidly that many thoughtful commentators appear agreed that we may have over-judicialized the system, with concomitant adverse effects on its efficiency as well as its accessibility to powerless litigants. [56] This is not the place to explore that difficult issue, but we clearly need to address ourselves more fully to that question.

A related concern is the one that will be voiced by Judge Higginbotham concerning the need to retain the courts as the ultimate agency capable of effectively protecting the rights of the disadvantaged. This is a legitimate concern which I believe to be consistent with the goals I have advocated. I am not maintaining that cases asserting novel constitutional claims ought to be diverted to mediation or arbitration. On the contrary, the goal is to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities.

Finally, we are robbed of much-needed flexibility by the constitutional requirement of jury trial. For present purposes this normally means that cases initially referred to binding arbitration (or some other nonjudicial process) must have the consent of both parties or else that a de novo trial must be permitted. Obviously we can live with such restrictions

and still achieve considerable constructive change, especially if, as in Pennsylvania, the price of the de novo appeal from arbitration is to require the appellant to assume the cost of the arbitration. But one is bound to wonder whether, as an original matter, the requirement of jury trial still makes sense in the run-of-the-mill civil ***133** case, particularly if one keeps in mind the attendant increase in cost and time. [57] In view of the desperate state of some of our civil calendars, it seems to me that the burden of persuasion should shift to those who maintain that the high costs are justified by unique advantages afforded by jury trials. Here again we must try to shun the endless abstract discussions of pros and cons, and seek instead to explore whether there are specific types of cases in which juries make more or less sense, so that we might opt ultimately for a constitutional amendment that would give greater flexibility to the legislature on this question.

Conclusion

It seems appropriate to end this fragmentary appraisal on a modest note. There are no panaceas; only promising avenues to explore. And there is so much we do not know. Among other things, we need far better data than are presently available in many states on what is in fact going on in the courts so that we can develop some sophisticated notion of where the main trouble spots are and what types of cases are prime candidates for alternative resolution. [58] We need more evaluation of the comparative efficacy and cost of different dispute resolution mechanisms. And we need more data on the role played by some of the key individuals in the process (e.g., lawyers). Do they exacerbate the adversary aspects of the case and drag out the proceedings (as many family law clients believe), or do they serve to control otherwise overly litigious clients (as trial lawyers often assert)? What is the optimal state of a country's grievance machinery so that festering grievances can be readily ventilated without unduly flooding the system and creating unreasonable expectations of relief?

Above all, however, we need to accumulate and disseminate the presently available learning concerning promising alternative resolution mechanisms, and encourage continued experimentation and research. In this connection we must continue to forge links with those from other disciplines who share our concerns. Their differing orientation and background often give them a novel perspective on the legal system.

I would like to close with a final suggestion. In preparing for this conference I encountered a number of compendious tomes embodying the proceedings of similar prior gatherings. I was ***134** struck with the recurring nature of many of the issues we are discussing, and wondered how we might avoid the unhappy fate that seems to have befallen many of the ideas thrown out at some of these earlier meetings. No doubt the organizers of this conference feel confident that we are more determined to avoid a similar fate, and for all I know, looking about at this impressive aggregation of concerned and able citizens, they are right. Still, it seems to me that at the conclusion of this meeting the organizers of this conference might designate a small group of dedicated individuals who would take it upon themselves to monitor the progress of some of the promising ideas that will be cast adrift here. Perhaps this group might even issue a Pound Conference Impact Statement at periodic intervals to remind us of our accomplishments as well as our remaining goals. In this way we may all be able to continue to contribute to the solutions of the many grave problems that presently beset the courts and that presumably brought us here.

a2 I am indebted to a number of colleagues and friends for helpful comments on earlier versions of this paper.

1 J. Barton, Behind the Legal Explosion, 24 Stanf.L.Rev. 567 (1975).

2 For the federal data, see Annual Report, Administrative Office of the U.S. Courts; for California, see Annual Report of the Administrative Office, 1975, p. 82.

3 See, e.g., A. Sarat & J. Grossman, Litigation in The Federal Courts: A Comparative Perspective, 9 Law & Soc.Rev. 321 (1975); A. Sarat & J. Grossman, Courts and Conflict Resolution: Problems in the Mobilization of Adjudication, 69 Am.Pol.Sci.Rev. 1200 (1975).

4 For present purposes I use the word "dispute" to describe a matured controversy, as distinguished, for example, from a "grievance" which may be inchoate and unexpressed.

5 See generally E. Johnson & V. Kantor, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases, to be published by the National Center for State Courts; M. Rosenberg, Devising Procedures that are Civil to Promote Justice that is Civilized, 69 Mich.L.Rev. 797 (1971).

6 See L. Brown & E. Dauer, Preventive Law-A Synopsis of Practice and Theory, in The Lawyer's Handbook (rev. ed. 1975 Am.Bar Ass'n); see also the same authors' forthcoming casebook on preventive law to be published by Foundation Press.

7 I would suggest the following criteria for determining the effectiveness of a dispute resolution mechanism: cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not in all, predictability may also be important.

8 The term "dispute processing" rather than "dispute settlement" is borrowed from W. Felstiner, Influences of Social Organization on Dispute Processing, 9 Law & Soc.Rev. 63 n. 1 (1974).

9 The Berkeley Complaint Management Project, under the direction of Professor Laura Nader, is presently pursuing some of these questions; a book entitled "How Americans Complain" is contemplated. A similar inquiry is being undertaken by the Center for the Study of Responsive Law in Washington, D.C.

10 See, e.g., A. Stone, Mental Health and Law-A System in Transition (Dept.H.E.W.1975).

11 In the federal system, the area of largest civil litigation growth has been that involving the newly expanded statutory causes of action (e.g., civil rights actions, social security claims, etc.). See, e.g., Annual Report, Administrative Office of the U.S. Courts, 1974, p. 390.

12 I have selected this factor as one that seems to me rather critical, but there are obviously other aspects in which the various processes differ and which must be considered (e.g., method and cost of selection of third party, qualifications and tenure of third party, formality of proceedings, role of advocates, number of disputants, etc.). Some of these are referred to interstitially in the ensuing discussion. Another factor that is often said to play a differing part in the various processes is the relevance of norms. But see M. Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 Harv.L.Rev. 637 (1976), suggesting that dispute settlement negotiation closely resembles adjudication in its frequent recourse to norms. See also A. Sarat & J. Grossman, Courts and Conflict Resolution: Problems in the Mobilization of Adjudication, 69 Am.Pol.Sci.Rev. 1200 (1975).

13 L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wis.L.Rev. 1, 19. See also L. Fuller, The Forms and Limits of Adjudication (unpub.mimeo.).

14 For present purposes the terms mediation and conciliation will be used interchangeably, although in some settings conciliation refers to the more unstructured process of facilitating communication between the parties, while mediation is reserved for a more formal process of meeting first with both parties and then with each of them separately, etc.

15 L. Fuller, Mediation-Its Forms and Functions, 44 So.Cal.L.Rev. 305, 325 (1971).

16 See W. Gellhorn, When Americans Complain (1966); P. Verkuil, The Ombudsman and the Limits of the Adversary System, 75 Col.L.Rev. 845 (1975); B. Frank, Ombudsman Survey (A.B.A.Sec.Ad.Law). New Jersey has recently established a broad-scale Department of the Public Advocate, containing a Division of Rate Counsel, a Division of Mental Health Advocacy, a Division of Public Interest Advocacy, and a Division of Citizen Complaint and Dispute Settlement. N.J.Stat.Ann. § 52:27E (Supp.1975). In addition to these public investigating officials, there are of course a host of private complaint processors employed by individual companies, by trade organizations or by the media.

17 See W. Felstiner, note 8 *supra*. Of course, as Felstiner notes, there are exceptions to this generalization. For example there may be enclaves having the characteristics of the simple society within the complex society, and sometimes overriding personal factors determine whether or not avoidance will be utilized in specific situations.

18 See R. Danzig and M. Lowy, Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner, 9 Law & Soc.Rev. 675 (1975). See also L. Nader, Powerlessness in Zapotec and U.S. Societies (mimeo.).

19 See S. Macaulay, Law and the Balance of Power (1966).

20 L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wis.L.Rev. 32-33.

21 See C. Foote, R. Levy & F. Sander, Cases and Materials on Family Law 1101-1109 (2d ed. 1976).

22 See D. King, Consumer Protection Experiments in Sweden (1974). Cf. E. Steele, The Dilemma of Consumer Fraud: Prosecute or Mediate, 61 A.B.A.J. 1230 (1975). The Swedish Public Complaints Board is one of five innovative dispute resolution mechanisms that is currently being studied by the Access to Justice Project, based at The Center for the Study of Comparative Procedure at the University of Florence, Italy, under the co-direction of Professor Mauro Cappelletti of that university and Professor Earl Johnson of the USC Law Center in Los Angeles. The Access to Justice Project will soon be publishing a number of documents detailing dispute resolution mechanisms in a number of countries (including the United States), as well as various theoretical studies.

23 See Professor Abram Chayes' forthcoming article on the new public law model of litigation, to appear in the June 1976 issue of the Harvard Law Review. One possible solution is for the court to utilize auxiliary mechanisms to aid its efforts. But see *Rizzo v. Goode*, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) rejecting such a solution.

24 For a comprehensive survey of these efforts, see, D. Aaronson, B. Hoff, P. Jaszi, N. Kithrie & D. Saari, The New Justice-Alternatives to Conventional Criminal Adjudication (Instit. for Advanced Studies in Justice, American University, Dec. 1975). See also Stulberg, *op. cit. infra* note 25, for a description and evaluation of the American Arbitration Association's somewhat comparable 4-A ("Arbitration-As-An-Alternative") project, and R. Nimmer, Diversion: The Search for Alternative Forms of Prosecution (Am.Bar.Found.1974).

25 See, e.g., J. Stulberg, A Civil Alternative to Criminal Prosecution, 39 Albany L.Rev. 359, 367 (1975); Exploring Alternatives to the Strike, Monthly Labor Rev., Sept. 1973, p. 33 (discussion of mediation-arbitration).

26 See L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wis.L.Rev. 23-30. See also Code of Professional Responsibility for Arbitrators of Labor-Management Disputes § 2F.

27 See C. Foote, R. Levy & F. Sander, Cases and Materials on Family Law, Chapters 1A and 6B (2d ed. 1976).

28 See, e.g., S. Roberts, A Family Matter, 38 Mod.L.Rev. 700 (1975), discussing an English case in which various sums were contributed by a man, his brother and his parents towards the purchase of a common household. After they had lived there for 13 years, the mother died, leaving her estate to her sons in equal shares. A dispute then arose between the two brothers as to their respective shares. The writer opines that formal adjudication does not appear to be the best way to settle this kind of dispute.

29 See J.M. Keating, Arbitration of Inmate Grievances, 30 Arb.J. 177 (1975). For a discussion of some other models in this setting, see Note, Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority, 81 Yale L.J. 726 (1972). See also J.M. Keating, V. McArthur, M. Lewis, K. Sebelius and L. Singer, Toward a Greater Measure of Justice: Grievance Mechanisms in Correctional Institutions (Center for Correctional Justice, Washington, D.C., 1975); Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions (Center for Correctional Justice, Washington, D.C.).

30 See R. Wilsnack, Explaining Collective Violence in Prisons: Problems and Possibilities, to be published in A. Cohen, G. Cole and R. Bailey, Prison Violence.

30a See United Steel Workers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

31 B. Ingvesson & P. Hennessey, Small Claims, Complex Disputes: A Review of the Small Claims Literature, 9 Law & Soc.Rev. 219 (1975).

32 A somewhat similar function is performed by law students as part of the Night Prosecutor Program in Columbus, Ohio. See Citizen Dispute Settlement (LEAA 1975).

33 A rudimentary beginning towards cost comparisons was provided in the evaluation report of the Philadelphia 4-A ("Arbitration-As-An-Alternative") project. See note 24 *supra*. The evaluators found a "direct" cost of $83.60 per project case as compared with a "direct" cost of $141 for each court case. But, as the evaluators note, there are many questions about such a comparison. To begin with, the figures depend upon the volume of cases, and with respect to court cases assume an average rather than a marginal cost allocation. And there is no attempt to control for the possibly differing complexity of the two classes of cases. See B. Anno and B. Hoff, Refunding Evaluation Report on the Municipal Court of Philadelphia's 4-A Project, Blackstone Associates, Washington, D.C., Feb. 25, 1975.

34 Other conceivable objections to such a proposal (e.g., denial of the right to a jury trial) are considered below.

35 Several Boston lawyers have told me this when I asked them why they did not use arbitration to a greater extent in connection with separation agreements.

36 This appears to be the practice in Pennsylvania. See National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Resource Materials, pp. 91-93.

37 See, e.g., the Blackstone Associates report, note 33 *supra*, indicating disposition of 88% of project cases in an average time of 49 days, whereas that was the shortest time in which the court disposed of any case. See also Resource Materials, note 36 *supra*.

38 In some past experiments, such as the 4-A project, the initial phase is denominated arbitration. But conciliation always represents an important initial step in that operation, see, e.g., Stulberg, *op. cit. supra* note 25, and the question then becomes whether the mediation and arbitration should be performed by the same person. I have earlier indicated my doubts about such a coalescence of functions. In addition, the use of separate personnel, though perhaps more expensive and time-consuming, makes possible the use of individuals with different backgrounds and orientations in the two processes.

39 For some other examples, see L. Nader and L. Singer, Law in the Future-What Are the Choices? Paper prepared for Conference Sponsored by California Bar, Sept. 12, 1975.

40 Conversely where the relationship is one of pure bargaining, but it is desired to have limited adjudicative intervention in case agreement cannot be reached, the final offer arbitration device sometimes utilized in public sector employment is available. See, e.g., Massachusetts Acts, 1973, ch. 1078. Under this process the arbitrator is limited in his decision to a choice between the last offer of the two parties. The obvious purpose is to engender good faith bargaining. See, e.g., Industrial Relations, Oct. 1975, for a number of articles seeking to evaluate the practice.

41 This assertion is based on the assumption that some of this new mediational work will displace work previously done by lawyers. But, as pointed out earlier, much of it may simply substitute for what is now being handled by avoidance.

42 Compare H. Edwards, Arbitration of Employment Discrimination Cases: An Empirical Study, to be published in the 28th Proceedings of the National Academy of Arbitrators by B.N.A., suggesting an uncertain command by labor arbitrators of the federal law of employment discrimination. See also D. Feller, The Impact of External Law Upon Labor Arbitration, paper delivered at National Conference on the Future of Labor Arbitration in America, to be published by the American Arbitration Association.

43 See R. Danzig, Towards the Creation of a Complementary, Decentralized System of Criminal Justice, 26 Stanf.L.Rev. 1 (1973); Comment, Community Courts: An Alternative to Conventional Criminal Adjudication, 24 Am.L.Rev. 1253 (1975); J. Jaffe, So Sue Me! The Story of a Community Court (1972).

44 See, e.g., Law in Culture and Society (L. Nader ed. 1969); J. Gibbs, The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes, 33 Africa 1 (1963), reprinted in Rough Justice: Perspectives on Lower Criminal Courts (J. Robertson ed. 1974).

45 For an optimistic answer to this question, see D. Smith, Book Review, 87 Harv.L.Rev. 1874 (1974). It is interesting to note that with the notable exception of the Jewish Community Board, whose work is the subject of the cited review, and a few other institutions, most of the experiments to date have involved alternatives to the criminal courts. Is this the result of some

conceptual notion, or, as I suspect, because, like the reputed response of Willie Sutton, the famed bank robber when asked why he robbed banks, "that's where the money is"?

46 See V. Aubert, Courts and Conflict Resolution, 11 J. Conflict Resolution 40, 44 (1967), suggesting that failure realistically to appraise a legal claim is one major reason for taking it to court rather than settling it. Other reasons given are irrational behavior on the part of litigants (e.g., undue pride or stubbornness) or the indivisibility of the claim in issue (e.g., child custody).

47 Massachusetts Laws, 1975, ch. 362.

48 There may also be serious question about the constitutionality of this provision, because of the participation of lay individuals in an essentially judicial function and the possible prejudice that may result from an apparently highly informal and abbreviated preliminary proceeding. See also the discussion of the right to jury trial *infra*.

49 For a thoughtful and modest proposal along these lines see P. Mause, Winner Takes All: A Re-examination of the Indemnity System, 56 Iowa L.Rev. 26 (1967). Once litigation involves a substantial economic cost for the loser, it is possible to create effective incentives for the settlement of cases. Such a system is presently in effect in England. It permits the defendant at any time to "pay into court" a proposed settlement sum; if the plaintiff refuses the offer and fails to recover more after trial, he forfeits his costs from the point of the offer into court, See M. Zander, Payment Into Court, New Law Journal, July 1975, p. 638. Some American states have similar provisions, but with costs not encompassing attorneys' fees, they do not have much bite. The English system of self-evaluation by the defendant may be compared with the Michigan Mediation system discussed in the text, *infra*. The Michigan System seems fairer but more costly since it calls for an independent evaluation of the plaintiff's claim.

50 S. Miller, Mediation in Michigan, 56 Judicature 290 (1973).

51 See R. Olson, An Examination of the Judicial Process: A Discussion of Modifications and Alternatives to Our System of Dispute Resolution, to be published in the Summer 1976 issue of Litigation, the journal of the A.B.A. Section on Litigation. The concept of "more fair and efficient adjudication of the controversy" is borrowed from Federal Rule 23(b). Mr. Olson's Committee is presently undertaking a nationwide survey, through interviews with judges, court administrators and experienced practitioners, of innovative approaches to reducing the time and expense of litigation as well as of promising alternative dispute resolution mechanisms.

52 See, e.g., *Kamm v. California City Dev. Co.*, 509 F.2d 205 (9th Cir.1975) (trial court in land fraud class action was justified in dismissing class action on basis of agreement that defendant would utilize arbitration to process potential multiple claims against it). But cf. *Rizzo v. Goode*, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (improper for district court to order creation of program by City of Philadelphia Police Dept. for processing recurring complaints of police misconduct).

53 Consider, for example, the provision of the Magnuson-Moss Warranty Act which requires the FTC to promulgate rules establishing procedures for informal dispute settlement mechanisms which must be exhausted before any lawsuit can be commenced under the Act. See Public Law 93-637, 88 Stat. 2183, and the implementing regulations adopted by the FTC, 40 Fed.Reg. 60190 (Dec. 31, 1975). Compare the suggestion that each statute creating substantive rights contain a judicial impact statement.

54 This presents au excellent opportunity for law students who seek to do creative field work, e.g., by helping a telephone company to set up a grievance mechanism, or studying the operation of the local ombudsman.

55 Cf. L. Rubenstein, Procedural Due Process and the Limits of the Adversary System, 11 Civ. Rights-Civ.Lib.L.Rev. 48 (1976).

56 See E. Johnson and V. Kantor, *op. cit. supra*, note 5, Chapter VI. See also H. Friendly, "Some Kind of Hearing", 123 U.Pa.L.Rev. 1267 (1975).

57 See, e.g., M. Redish, Seventh Amendment Right to Jury Trial: A Study of the Irrationality of Rational Decision Making, 70 Nw.L.Rev. 486 (1975).

58 Apart from deficiencies in particular states, interstate comparisons are particularly hampered by the lack of comparability among the data.

THE PRIORITY OF HUMAN RIGHTS IN COURT REFORM

by THE HONORABLE A. LEON HIGGINBOTHAM, JR. [a3]

Judge, United States District Court Philadelphia, Pennsylvania

We must be forever mindful that when Roscoe Pound spoke here in 1906 he was primarily concerned about assuring justice and improving its quality for all of our citizens. He was not interested in any band-aid or cosmetic process which would mask the wounds of injustice that degraded the judicial system. To use his term, he felt that one must probe the "*causes*" of the dissatisfaction and, to the extent possible, eliminate the wounds while preserving the positive strengths of our judicial body.

I have been asked to analyze the "*** appropriate criteria for determining the kinds of disputes which should concern the courts, no doubt placing some emphasis on constitutional issues and questions of human rights." To analyze human rights in the judicial process, one must understand the history ***135** of the specific eras in which rights evolve. One must be careful not to assume that solutions proposed in 1906, even by such a thoughtful observer as Dean Pound, will be entirely adequate to meet the challenges, storms and aspirations of a nation which has reached its bicentennial birthday.

I do not believe that this stance is unfaithful to the spirit of that eminent scholar whose address is the inspiration for our own deliberations. While we have already heard and undoubtedly will hear many entirely appropriate suggestions about how we might avoid litigation, in his own time Pound took issue with what he called "the stock saying that litigation ought to be discouraged." As he phrased it, "in discouraging litigation we encourage wrongdoing *** of all people in the world we ought to have been those most solicitous for the rights of the poor, no matter how petty the causes in which they are to be vindicated." [1]

Pound was bemoaning the tendency to discourage litigation rather than to create new forums for it, such as municipal courts, or small claims courts, because "with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed." [2]

Some rights, however, must be asserted through traditional litigation processes. We can learn something about this from one of Dean Pound's colleagues and contemporaries, Moorfield Storey, Boston advocate, and former American Bar Association President. In 1911, he devoted a lecture series at Yale Law School to *The Reform of Legal Procedure*, in which he bemoaned "the congestion of the docket, the fact that cases are brought faster than they can be tried, and the inevitable accumulation of work." [3] Storey's "first remedy" was legislation to remove some of the causes of litigation, and he advocated especially workmen's compensation systems. Yet Storey knew that there were some rights that had to be secured in the courts, and that is why he acted as counsel for the N.A.A.C.P., an organization he helped found, [4] in three momentous cases in the Supreme ***136** Court-cases that surely spawned more litigation. The cases were *Guinn v. U.S.*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), outlawing the "grandfather clause," *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), invalidating a Louisville housing segregation ordinance, and *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923), asserting the right to federal habeas corpus from a state trial conducted in the passion of racism.

I

I think that Chief Justice Burger, one of the moving forces behind this meeting, was quite realistic when, in his address to the American Bar Association two months ago, he said, "It would be a mistake to create great expectations about this conference that cannot be fulfilled in the short term." But the Chief Justice also said, "we are determined that the

monumental dimensions of the task and the improbability of immediate results should not keep us from undertaking the inquiry." I agree wholeheartedly. We ought to begin the inquiry, for I am no opponent of judicial reform. Early in my career on the bench, I had the privilege of assisting the then Chief Judge, now Senior Judge, Thomas Clary in moving the District Court for the Eastern District of Pennsylvania from a master calendar system to an individual calendar system, a change that has materially increased the efficiency of our court and has drastically reduced the average disposition time for cases filed there. Even now, I fear that I weary my colleagues in the Eastern District with memos suggesting ways in which we might deal more expeditiously with the business of our court. Much can be accomplished by procedural changes, systems analysis and incorporation of sophisticated management techniques. [5]

Yet in putting Roscoe Pound and the era in which he spoke in adequate perspective, we must be mindful of the possibility that too intense a focus on form can obscure our perception of ***137** matters of substance-"human rights," for instance. I know that when I speak of concern for human rights, many may respond: "But who opposes the judicial protection of human rights?" In the abstract, of course, no one does. In practice, however, it is often another story. Suppose, for example, that someone had sponsored a conference similar to this one on the 25th anniversary of Pound's address. If such a conference had been held in 1931, some of us here today would have been excluded from membership in one of the sponsoring organizations. [6] Yet such a conference in 1931 would undoubtedly have been composed of honorable persons who would have bristled with indignation at any suggestion that they were not concerned about human rights. We know now that 1931 was not the millenium. Neither, I submit, is 1976. There are still, and perhaps always will be, issues outstanding on the human rights agenda. We neglect them at our peril. Thus, I disagree with those who may ultimately feel that my entire analysis is only the creation of a "straw man," followed closely by its systematic destruction. That is not my intention. What I hope to do is point out some dangers on the road to reform, dangers that if ignored could cause, not progress, but retrogression. The engineer who stresses the dangers that menace a rocket's crew, even ***138** though their ship has not yet left its launch pad, is not opposed to landing on the moon. But unless those dangers are recognized, the ultimate landing may not be worth the sacrifices endured during the journey.

The quest for meaningful improvements in the way we settle disputes can be an intellectually challenging and perhaps even fascinating adventure-and a priority of the first order-especially for those of us who are required by our calling to plunge ourselves daily into the minutiae of the law. Yet our goal cannot be merely a "reform" that seeks to ease the courts' caseloads. For what does it profit us if, in making things easier for ourselves, we make things more difficult for others? What does it profit us if, in shifting our burdens to other agencies and institutions, we make impossible the burdens on those who must deal with those agencies and institutions? What does it profit us if, in putting our own judicial houses in order, we have no room in them for those who have relied and must continue to rely on the hospitality of the courts for the vindication of their rights? What does it profit us if, by wielding a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure justice? I do not contend that this will happen. Certainly, it need not. But I do say that we must be aware of the temptation to proceed as though the judicial process involved only parties, not people. If judicial reform benefits only judges, then it isn't worth pursuing. If it holds out only progress for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America. It is worth pursuing only if it helps to secure those constitutional and statutory rights which, because they should be enjoyed by all our citizens, have made our democracy, despite its faults and failures, a significant model for the world.

The reformers whose contributions we prize today-Pound and Storey, for example-set their attack on inefficient courts and legal institutions within a broader vision of the needs of an America recently traumatized by industrialization, by waves of helpless immigrants and by a pervasive hostility to the rights of large classes of citizens. They realized that courts had to be reformed and new institutions of dispute settlement created in order to remedy the injustices-great and small-that pervaded American society at the turn of the century.

Our starting points must be a review of the era of the early 1900's and a careful appraisal of the quality of justice *then* available to the mass of our citizens-particularly the black, the ***139** weak, the poor, the consumer, and the laborer-

that configuration of persons which, in 1906, might have been termed "powerless." We have to make those assessments so that in our quest for reform we do not unwittingly turn the clock back to the diminution of rights which persisted then. We must never forget that in part the increased judicial workloads and more complex judicial problems of the last several decades have been often the unavoidable concomitants of a long-overdue expansion of many substantive rights.

Roscoe Pound spoke here just three years after the Wright Brothers had taken their maiden flight at Kitty Hawk; he spoke at a time when the population of the country was predominantly rural; he was describing a world which knew neither the atomic bomb nor the benefits of harnessing nuclear energy. Sulfa drugs, penicillin, and antibiotics were undreamt of marvels. In reality, he spoke to a nation where the rights of the powerless were not the predominant concerns of either the legal process or the legal profession. There were no major governmental agencies to protect the consumer, [7] the aged, the pensioner, the investor, or the workingman.

In 1900, all expenditures of the federal government amounted to less than half a billion dollars. The Department of Justice spent 1.3 percent of that sum, less than seven million dollars. By 1975, total federal expenditures had increased seven-hundred fold, to approximately 325 billion dollars. In 1975, the Justice Department's expenditures alone exceeded two billion dollars, four times the total sum expended by every branch of the federal government in 1900. In the light of this massive expansion of government and its functions, [8] we should not be surprised that the business of the courts has increased, for they are called on to monitor the pervasive relationships between government and citizens that this expansion has created.

II

If we are to place the era of which Pound spoke in proper perspective, if we are to see its true relationship to the challenges ***140** we face today, we must analyze how the courts, and sometimes society at large, dealt with fundamental issues of human rights. As we look back to 70 years ago, and compare that time with our own, George Santayana's celebrated comment on the uses of history becomes particularly relevant: "Those who cannot remember the past are condemned to repeat it." [9] A focus on six groups of individuals will shed some light on our inquiry:

> racial minorities, women, the voter, working people, the victims of crime, and victims of court insensitivity.

I submit that over the past 70 years, the greatest legacy of our legal and judicial institutions has been their role in helping to secure the rights of these people, to see to it that they received the justice that is the due of every person in this country. I submit moreover that our greatest obligation in preparing for the next 70 years and beyond is to protect that legacy and to make its principles the basis on which we fashion new methods of dispute settlement and develop new procedures within the courts.

Race and the Legal Process

While I recognize that extraordinary progress has been made since Pound spoke, and without intending to offend anyone, it is appropriate that we focus on race relations as they existed in 1906-a time when blacks had been residents in this country for almost three centuries, though mostly as slaves. [10] Every ***141** presidential commission [11] and almost every Supreme Court opinion [12] dealing with racial matters have noted the fact that in ***142** this country there has often been racial injustice for blacks. Three incidents are sufficient to highlight that human rights issue. They explain why, when the pendulum of recognition of the aspirations of black Americans began to swing in the 1950's, it had to swing as far as it did.

When in 1896 in *Plessy v. Ferguson* [13] the United States Supreme Court sanctioned a strange doctrine [14] that, among the multitude of peoples, ethnicities and groups in this country, blacks (and basically only blacks) could be isolated by the state in human affairs, Justice John Harlan dissented eloquently on the grounds that "the common government of all [should] not ***143** permit the seeds of race hate to be planted under the sanction of law." [15] But soon after that sanctioning of racist law one state was spending ten times as much for the education of each white child as it was for the education of each black child, and many were spending twice to three times as much for the education of each white child. [16]

The racial disparity and discrimination that existed in education was sanctioned by the legal process in almost every other area that today would be categorized as a human right-in housing, employment, voting, and personal relations.

The ultimate irony of the decade in which Pound spoke is perhaps best exemplified by *Berea College v. Kentucky*, [17] when the Supreme Court in 1908 upheld the validity of a 1904 Kentucky statute which prohibited a private college from teaching white and Negro pupils in the same institution. Berea College was established in the Kentucky mountains in 1854 by a small band of Christians who began their charter with the words, "God hath made of one blood all nations that dwell upon the face of the earth." After the Civil War it admitted students without racial discrimination, and by 1904 it had 174 Negro and 753 white students. It was a private institution supported by those who subscribed to its religious tenets, and it neither sought nor received any state aid or assistance. Yet the Supreme Court held that a state could prohibit any *private* institution from promoting the cause of Christ through integrated education. What a tragic ruling! A nation loudly pronounces its faith in freedom of religion, yet sanctions a state's denial of the day to day application of religious concepts if practiced in an integrated religious setting. Justice Harlan wrote another eloquent dissent in *Berea College;* tragically, Justice Holmes, for all his prescience and ability, concurred in the majority's repressive opinion.

The human rights level of this country in that decade was strikingly illustrated when a most moderate colored leader, Booker T. Washington, had an informal lunch with President Theodore Roosevelt. [18]

***144** The Memphis Scimitar said,

> "The most damnable outrage which has ever been perpetrated by any citizen of the United States was committed yesterday by the President, when he invited a nigger to dine with him at the White House." [19]

Senator Benjamin Tillman of South Carolina said:

> "Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places." [20]

Georgia's governor was sure that "no Southerner can respect any white man who would eat with a Negro." [21]

The sequellae of judicial obliviousness and legal antagonism to the human rights of blacks is perhaps most dramatically exemplified by the response which a United States Senator, who was also a lawyer, gave to the 1944 suggestion of Dr. Studebaker, of the U.S. Office of Education, that the colleges and universities of the South should open their doors for the matriculation of Negro students. Senator Theodore Bilbo gave his "full and complete endorsement" to the Jackson (Mississippi) Daily News' editorial comment that the Washington officials should "go straight to hell." He emphasized that:

> [The editor] is right when he says that the South won't do it and that not in this generation and never in the future while Anglo-Saxon blood flows in our veins will the people of the South open the doors of their colleges and universities for Negro students. I repeat that [the editor] is right. We will tell our Negro-loving Yankee friends to go straight to hell. [22]

He concluded by stressing that:

> History clearly shows that the white race is the custodian of the gospel of Jesus Christ and that the white man is entrusted with the spreading of that gospel.

***145**

> We people of the South must draw the color line tighter and tighter, and any white man or woman who dares to cross that color line should be promptly and forever ostracized. No compromise on this great question should be tolerated, no matter who the guilty parties are, whether in the church, in public office, or in the private walks of life. Ostracize them if they cross the color line and treat them as a Negro or as his equal should be treated. ***

> [I]t is imperative that we face squarely and frankly the conditions which confront us. We must not sit idly by, but we must ever be on guard to protect the southern ideals, customs, and traditions that we love and believe in so firmly and completely. There are some issues that we may differ upon, but on racial integrity, white supremacy, and love for the Southland we will stand together until we pass on to another world. [23]

Thus, during World War II, almost 50 years after *Plessy* and almost 40 years after Pound's address, while thousands of black soldiers were dying on battlefields throughout the world to seek victory for democracy against Hitler's Aryanism, the mold of racism was still firm at home, to such an extent that neither civil rights legislation nor anti-lynching laws could be enacted.

Other defenders of Jim Crow [24] spoke in voices less shrill than Bilbo's, but their hatred and their racism were just as intense. Instead of linking, as Bilbo did, the gospel of Jesus Christ with white supremacy, his successors used more sophisticated terms like “interposition” and “nullification” and demonstrated a willingness to sit in school house doors forever to assure segregation forever.

I have cited these instances because they are a part of America's history. I recognize that some former proponents of segregation are now semi-devotees of civil rights for all. Much progress ***146** has been made, and today's challenges span all regions and sectors of our country. I do not mention this earlier era to antagonize, but rather to reemphasize that today's complexities owe their existence in significant part to the legal process of yesterday, which was often inadequate and uncommitted to assuring equal justice for all.

What I have said about blacks as an example applies with much the same force to other segments of the population which seven decades ago were powerless.

The Status of Women

Some persons question the appropriateness of courts adjudicating whether girls can play Little League baseball or whether women should be assigned police patrol work or whether females should be admitted to all-male educational institutions. They urge that these troublesome disputes be kept out of court, for "after all, men are men and women are women. God made them that way. Why should the courts get involved?" More often than not, such short-sighted concerns for judicial tranquillity and uncluttered courts fail to recognize the dehumanization which the bench, the professional bar associations, the law schools and even the legal profession as a whole sanctioned or tolerated for so long. They fail to recognize as well that while there is an essential place for non-judicial forums in resolving disputes, the cutting edge of the move to remedy the results of this dehumanization must have a sharp judicial component.

Is it without significance that when Roscoe Pound spoke, women could not be admitted to the esteemed law school whose dean he later became, and that it took almost a half century after Pound's 1906 speech for Harvard Law School to reach that stage of enlightenment where it deemed women worthy to enter the portals of the law school which produced Justices Story, Holmes, Brandeis, Frankfurter, Brennan and Blackmun [25]?

The sad fact is that in 1906 the appearance of women attorneys in the courts was almost as rare as astronauts landing on the moon. Their second-class status even in our profession was sanctioned by the courts and the entire legal process. The United States Supreme Court in decades past has sanctioned patent deprivations of opportunity for women. Thus Myra Bradwell was denied admission to the bar of the State of Illinois in 1872 ***147** solely because she was a woman. Except for Chief Justice Chase, all of the Justices felt that the denial of her admission to the bar did not violate her federal constitutional rights. Justice Bradley felt compelled to add a concurring opinion:

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. *** The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. State of Illinois, 16 Wall. 130, 83 U.S. 442, 446, 21 L.Ed. 442 (1873).

In 1906 women did not have a federal constitutional right to vote, and many were precluded even from serving on juries.

There has been progress. In 1872, the Justices of the Supreme Court considered women "naturally timid," "delicate," and "evidently unfit" for many of the occupations of civil life. In 1974, the Court categorized past deprivations of women as either "overt discrimination" or "the socialization process of a male-dominated culture." [26] If we are serious about lowering the barriers which previously confronted women, necessarily the courts' backlogs ***148** and burdens will be steadily increased and court reform must be cognizant of this fact.

Voting: A Fundamental Right

As I have said, when Roscoe Pound spoke, women did not enjoy a federal constitutional right to vote. Not until 1920 did the Nineteenth Amendment remove that particular badge of inferiority from approximately one-half the nation's adult population.

The franchise was restricted in other ways, too. I have already discussed some of the grievances of black Americans in the early decades of this century. The deprivation of voting rights was often another. Theoretically, the Fifteenth Amendment had secured the right of suffrage to black Americans. In many parts of the country, however, they were practically disenfranchised-through literacy tests, poll taxes, grandfather clauses [27] and the like. Though there was some erosion of the obstacles to the exercise by blacks of their Fifteenth Amendment rights, [28] those obstacles remained substantially intact in many areas until the passage and enforcement of the Voting Rights Act of 1965 [29] at last allowed black victims of voting discrimination some voice in the determination of their own political destiny.

Moreover, in 1906, the apportionment of several state legislatures had already taken the form that would endure, with steadily increasing imbalances in voting power, until the "one-person, one-vote" decisions of the 1960's. [30] These latter decisions, as we all know, transformed the political face of the nation, [31] but not without severe criticism by some who thought ***149** the judiciary was intervening in an area beyond its competence. Justice Frankfurter, dissenting in *Baker v. Carr, supra*, said the case was "unfit for federal judicial action," and termed the decision itself "a massive repudiation of the experience of our whole past." [32] The second Justice Harlan, dissenting in *Reynolds v. Sims, supra*, argued that it and other reapportionment decisions "give support to a current mistaken view *** that every major social ill in this country can find its cure in some constitutional 'principle,' and that this court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements." [33] I agree with the suggestion that the Constitution is not a panacea for every social ill. The dissenters were certainly right when they warned that judicial review of state reapportionment plans would be fraught with difficulty. Nevertheless, I cannot accept their conclusion, for it leads to judicial paralysis in matters involving critical rights. Chief Justice Warren's majority opinion in *Reynolds* announced a principle that no conference on judicial reform can afford to ignore: "a denial of constitutionally protected rights demands judicial protection." [34] In spite of the problems inherent in complying with the mandate of the reapportionment decisions, it is incontestable that these decisions were responsible for a fundamentally more equitable redistribution of political power in our country, one that was long overdue. Our democracy and our people are the beneficiaries.

***150** *The Situation of Working People*

Sixty years ago, Roscoe Pound was witnessing the breakdown of the common law system, a system which for its efficient functioning relied primarily on the initiative of individuals, who were expected to look out for themselves and to vindicate their own rights. As Pound put it in his 1906 address:

> In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses

> from plundering public funds. Public suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interest, common-law methods of relief have failed." [35]

The courts of that time, however, were still trying to apply common-law concepts to the social and economic problems of the "modern industrial society" that Pound saw emerging. The effort was not universally acclaimed, leading Pound to say that "[a]t the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation." In fact, he concluded, "the courts have been put in a false position of doing nothing and obstructing everything." [36]

A few familiar examples will illustrate the obstructionism that, in Pound's view, courts were compelled to indulge in because of their fidelity to obsolete common-law concepts. In *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), the Supreme Court invalidated a New York maximum hours law because it interfered with the freedom of bakers to enter into contracts with their employers. In *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908), the court held that Congress could not prohibit employers from discriminating against their workers for the union organizing activities of the latter. And in *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), the Court ruled, again on hallowed "freedom ***151** of contract" grounds, that a state could not outlaw "yellow dog" labor contracts. To the Court's credit, it did not strike down *every* social welfare measure presented to it. In *Muller v. Oregon*, [37] it upheld a maximum hours law for women, though on grounds that some women might find offensive today.

Lochner, Adair, and *Coppage* were not the end of the story, of course. Eventually, all were expressly overruled as the Supreme Court itself adjusted to emerging social and economic realities. [38]

I am well aware that some believe that the impotence the workingman experienced in the early decades of this century has been replaced by the omnipotence of organized labor today.

I will not join that debate; rather, I wish to emphasize that many of the gains and successes of workingmen and/or organized labor today are directly attributable to rights which have been recognized or expanded by the courts of previous generations. Thus, are we to now say that the system which has made the courts accessible to and supportive of the workingman should not now be involved in striking a balance for other groups which have not had full entry into the system?

Victims of Crime

In his 1906 address, Pound did not identify or discuss as a major problem any dissatisfaction with the criminal justice system. He apparently felt no need to focus on that system for that specific audience. [39] This conference, of course, has such a focus, a much needed one, and we will, I am sure, hear a good deal about it tomorrow, from some of the remaining speakers. But I submit that it is too narrow a focus unless it embraces the *victim* of crime as well as the person whom the system calls the perpetrator. Of course, we should be concerned about the Fourth, Fifth and Sixth Amendment rights of the criminal defendant, but we should also be concerned about the fundamental civil right of the ordinary citizen to be secure in his or her person ***152** and property. Of course, we ought to be concerned about the humaneness of our prison systems, but we ought also to be concerned about the humaneness of our urban environments and the safety of our streets. When the streets are not safe, when every citizen carries an extra burden of fear, his environment is not humane. Of course, a criminal defendant has a right to bail, but we should not allow unlimited delays in trial which

prolong bail indefinitely. Of course, a defendant has a right to the effective assistance of counsel, but that should not mean that he may postpone trial indefinitely while waiting for a specific counsel of his choice. Please do not mistake my meaning. I am not suggesting that the guarantees of the Bill of Rights be suspended. But I do submit that while criminal defendants have a constitutional right to a speedy trial, society at large also has a vital stake in the prompt disposition of criminal charges against a defendant. Securing the prompt disposition of such charges must be a top priority in any reform of the judicial process. While progress is being made under statutes designed to assure defendants a "speedy and fair trial," much remains to be done. There will be problems in the transition. It will not be easy. Courts may have to assume more burdens, but it is difficult, if not impossible, to justify why individuals should be out on bail on serious crimes for months and sometimes years before final trial disposition.

In the context of this conference, the courts bear a heavy reponsibility to organize themselves for the fair but expeditious processing of criminal cases. To a major extent the disposition of serious crimes is not a function which can be delegated to agencies other than the courts. Thus, in terms of our concern for human rights, we must work simultaneously on improving the processes of the criminal justice system for both the victims and the defendants and on preserving the court's capacity to deal with other fundamental human rights as well.

Victims of Court Insensitivity

There is another point which deserves to be stressed in any discussion about reform of the criminal and civil justice systems. We have to be concerned about innocent victims of the justice system itself, about those who are not part of the courthouse bureaucracy. Go into the courts in most urban communities and you will often observe either outrageous insensitivity to, or woeful systems planning for, witnesses who respond to subpoenas. It is not unheard of for a witness to appear eleven or twelve times as a case is continued again and again, either because the ***153** court cannot reach it or because some counsel is not available. In civil cases, parties sometimes wait five years for an adjudication of their rights. Court personnel sometimes treat citizens with a curtness that some of the less enlightened prison wardens would not display to the convicted felons in their custody. In this context of insensitivity to, and of non-support for, the participants in the litigation process, we have to ask whether some of the sacred rights we espouse are really designed for justice and the benefit of the parties and the public, or do these processes exist more for the basic convenience of judges and lawyers. It is not clear to me whether some of the many continuances that are granted by the courts are caused by a desire to let every person have his own counsel, or, instead, are these delays unintentional placations of the bar which permit some lawyers, who have more clients and cases than they can now adequately handle, to increase their backlog so that the date of ultimate trial is indefinitely postponed. It is not at all clear to me whether an oligopoly is now developing within the bar whereby the entire judicial system is designed, or at least has been modified, to accommodate the schedules of the busiest and most successful lawyers rather than to function within reasonable time frames for the prompt and fair disposition of their clients' cases.

Permit me to mention just one well-documented instance that reveals how the judicial system, and even judges, can be insensitive to the dignity of the citizens who are caught up in the legal process. A black woman was testifying in her own behalf in a habeas corpus proceeding. "The state solicitor persisted in addressing all Negro witnesses by their first names" [40] and when he addressed the petitioner as Mary, she refused to answer, insisting that the prosecutor address her as "Miss Hamilton." The trial judge directed her to answer, but again she refused. The trial judge then cited her for contempt. On appeal, the highest court in the state affirmed, because the record showed that the witness's name was "Mary Hamilton," not "Miss Mary Hamilton." Happily, the Supreme Court of the United States granted certiorari and summarily reversed the judgment of contempt. *Hamilton v. Alabama*, 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964), *rev'g* 275 Ala. 574, 156 So.2d 926 (1963). Some might say that this case exemplifies an unjustifiable waste of legal talent and judicial effort in order to determine whether the appellation "Miss" should be used in cross-examination. I disagree. At the core of this case was a person begging that a ***154** system which is supposed to dispense justice treat her with dignity and the kind of sensitivity that courts automatically accord to persons of power and prestige. [40a]

III

In View of Our History, Are Courts Functioning Beyond Their Competence in the Human Rights Area, and What Are the Alternatives?

While I have stressed that we should be particularly cautious about any reforms which may cause a diminution of basic and fundamental human rights, I am no opponent of good order. I have supported every judicial reform measure that promised to contribute to the orderly functioning of our courts without sacrificing the rights of our citizens. I submit, however, that order is not an absolute. It cannot be, for human affairs, and especially the affairs that come before us in the judicial process, are often inherently disorderly. In some cases, passions not only run deep, they erupt into violence.

I have in mind not just the felony dockets of local criminal courts, but also landmark human rights decisions where the Supreme Court of the United States rejected arguments that such cases were, for a variety of technical reasons, not the proper business of the federal courts.

In *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), for example, a black man who had been charged with the theft of a tire was beaten to death by the sheriff of Baker County, Georgia, and two other law enforcement officers. In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), police officers of a Northern city had broken into the petitioners' home, routed them from bed, and forced them to stand naked in the living room while they ransacked every room in the house. In the background of *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), was the murder of three civil rights workers, Michael Schwerner, James Chaney and Andrew Goodman. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), involved a group of black citizens who, while driving along a highway in Mississippi, were mistaken by whites for civil rights workers. They were forced to stop, ordered out of their vehicle, and beaten with iron clubs.

***155** Should these matters have been in the federal courts? I think so, for if the Supreme Court had not been willing to expand an overly narrow construction of the federal civil rights acts, where would these particular victims, and others like them, have gotten justice?

A basic reason for the necessity of having the courts available to vindicate the rights of our citizens is that other institutions in our society, institutions designed to either vindicate or protect those rights, have either failed to do so or have broken down completely. We should never be complacent about the accomplishments of the judicial system. I certainly am not, and I believe that one of the profound contributions this conference can make to the nation is to shatter any illusions we might entertain about living in the best of all possible judicial worlds. Nevertheless, I am convinced that the courts, when their achievements and their efficiency are compared with those of other institutions in our society, have not been abysmal failures. The short and simple reason for the assumption by the courts of tasks that are allegedly "beyond their competence" is the failure of supposedly competent institutions to perform those tasks effectively or with adequate protection of the rights of the clients of those institutions. I agree that in the best of all possible judicial worlds, judges should not be asked to run railroads or to function as school superintendents or to serve as chief executive officers of state prison systems. But if supposedly competent businessmen so manage a railroad that it collapses into bankruptcy, or if supposedly professional educators countenance or are powerless to deal with *de jure* segregation in the school systems they are charged to administer, or supposedly competent corrections personnel preside over a prison system that is riddled with constitutional violations, then judges have no choice but to intervene. The courts, I submit, are not reaching out for these responsibilities; they come to the courts by default. And so long as other institutions in society default on *their* responsibilities, the court will have what I consider an absolutely necessary role to play in the vindication of individual and collective rights.

It was Alexis de Toqueville who first said that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." [41] In his 1906 address Dean Pound said much the same thing: "the subjects which our constitutional polity commits to the courts are largely matters ***156** of economics, politics, and sociology, upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation." [42] We may not agree with Roscoe Pound that great matters of economics, politics, and sociology are always tried as incidents of private litigation," but they are surely "made into legal questions." The fate of the New Deal, largely a matter of economics, remained uncertain until the decision of the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). The people's right of access, through a grand jury, to information in the control of the executive branch of government, a political issue of the utmost seriousness, was a matter of speculation until the Supreme Court enforced a subpoena on the President in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The destiny of black people in America, a matter of sociology as well as of justice, was unclear until the Supreme Court found segregated schooling inherently unequal in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and its progeny. There is, of course, no guarantee that even a definite pronouncement by the courts will put to rest all dispute over an issue of public policy. Witness the continuing controversy over abortion.

Nevertheless, I still submit that our constitutional polity could barely function at all if the courts were not available to vindicate the rights of our citizens and thus define the limits of public and private action within that polity.

We are all familiar with the famed Footnote Four of Chief Justice Stone's opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Even though it deals with the standard to be employed in reviewing legislative enactments and even though it suggests more than it proclaims, that footnote has rightly been read as a manifesto of judicial sensitivity to the rights of those who are powerless to vindicate their rights. Since the *Carolene Products* decision, the courts have done much to redeem the promise of Footnote Four, and I suggest that we can fruitfully apply its teaching in this conference as well. We will be dealing, of course, with proposals for reform of dispute resolution and for the reform of judicial administration, not legislative enactments. Some have suggested that a "judicial impact" statement be prepared before statutes creating new legal rights are enacted, so ***157** judicial resources can be provided to protect them. I suggest, by the same token, that we prepare, at least mentally, another kind of impact statement, one that weighs the effect of the reforms that might be proposed to us on what Foootnote Four termed "discrete and insular minorities," and subject those reforms that might work to the disadvantage of the poor, the weak, and the powerless to what Chief Justice Stone would call "a more searching judicial inquiry."

You may have noticed that I have not defined what I mean by the term "human rights." The omission is deliberate. I doubt that, even if I tried, I could formulate a definition of "human rights" that would adequately differentiate my perception of fundamental "human rights" from the multitude of varied interests that, at one time or another, have been called "human rights." [43] I do think we ought to be concerned about what has been rightly termed a trivialization of the Constitution. For instance, some would argue, though I would not, that a high school football player has an absolute "human right" to wear long hair, regardless of his team's regulations or his coach's notion of discipline. Others would argue, though I would not, that prisoners have an absolute "human right" to snacks between meals. Cases involving these issues, I submit, seek the vindication of rights that are merely asserted, not real. Such cases, I am afraid, misuse a noble instrument, designed for a noble purpose, the protection of fundamental rights.

I should also point out that I do not include in the concept of "fundamental" human rights the interests that are at stake in automobile negligence cases, or longshoremen's suits, or medical malpractice actions. I am confident that we can develop means by which justice could be assured in these areas of tort law without the courts playing a central role and without destroying the fabric of our society. In all candor, I often wonder whether the ***158** loudest protests against no-fault auto insurance and against the removal of negligence cases from the courts stem from concern about the plight

of accident victims or whether they originate in a concern about possible diminution of what are sometimes phenomenal windfalls in the form of counsel fees.

I believe that the victims of defective products, medical malpractice and automobile negligence can often receive greater protection in alternate systems of dispute resolution than they can in the courts. During my twelve years' experience on the bench, I have seen far many more specious claims and frivolous defenses in personal injury cases than I have in civil rights cases. If we are going to apply a scalpel to our dockets, let us begin with these cases, which could be handled with fairness and greater efficiency in other forums.

I believe, however, that in the universe of human rights, the constellation of rights that I have discussed today are grouped at or near the center. I refer, of course, to the right to be free from racial or sexual discrimination, the right to vote, the right to basic protection from overpowering forces of the industrial age, the right to be secure in one's person and property, and the right to be treated with courtesy and consideration by a system that purports to be one of justice, not merely of law. If my references to astronomy lead some of you to think that I am too far out, let me also say that I believe that there is a hierarchy of human rights, and that the rights I have discussed cluster at or near the top of that hierarchy. Finally, I believe that all of us can agree that the rights I have discussed are indeed fundamental “human rights.”

Conclusion

As I close, I hope that I have not gone too far. I know that I have resurrected some grievances that are 70 years old, and whose roots lie even further back in American history. I know that I have spoken stridently about them, and stridency is always susceptible of misunderstanding. I did not come here intending to offend anyone, but perhaps I have. Perhaps I have spoken too stridently for 1976, perhaps too stridently in light of the genuine progress this nation has made in the past 70 years, perhaps too stridently in the overall perspective of this country's history. But the grievances that I have mentioned were, and continue to be, harsh and discordant experiences in the lives of the victims, and their harshness has been caused in part by an insensitive legal and judicial process.

***159** As I said at the outset, I wish this conference well. I hope it is successful. But I also hope that the fruits of its success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this-the weak, the poor, the powerless-those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just. We have enough victims in our society. In so many instances, they are victims of the conduct of others that violates the law. Let us not forget them. Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.

a3 While I accept total responsibility for all views expressed here, I wish to note that in many respects this paper has been jointly authored through the able assistance of my law clerk, Thomas M. Gannon, S.J., whose contribution I am pleased to acknowledge.

1 R. Pound, The Spirit of The Common Law (1921) at 134.

2 R. Pound, supra at 132.

3 M. Storey, The Reform of Legal Procedure (1912) at 50.

4 Moorfield Storey was the first president of the NAACP. For its history, see L. Hughes, Fight for Freedom: The Story of the NAACP (Berkeley Ed.1962).

5 I have developed these views in "Effective Use of Modern Technology," in JUSTICE IN THE STATES: ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY (W. Swindler, Ed.) 140 (1971) and "The Trial Backlog and Computer Analysis," 44 F.R.D. 104 (1968). Fortunately, court management personnel are coming to realize that courts need not only managerial principles but also need to know how to apply those principles in the courts' special milieu. See, for example, E. Friesen, E. Gallas & N. Gallas, MANAGING THE COURTS (1971), and consult the JUSTICE SYSTEM JOURNAL, published by the Fellows of the Institute for Court Management. See also R. Wheeler and H. Whitcomb, PERSPECTIVES ON JUDICIAL ADMINISTRATION: TEXTS AND READINGS (forthcoming, 1977).

6 "[D]iscrimination against Negro lawyers by the American Bar Association *** led to the formation of the colored National Bar Association. In 1943 the American Bar Association elected a Negro, Justice James S. Watson of New York, the first to be admitted since 1912 when three Negroes, who wore not known to be Negroes, were accepted. The same year the Federal Bar Association of New York, New Jersey, and Connecticut opened its membership to Negro attorneys and condemned the 'undemocratic attitude and policy' of the American Bar Association for discriminating against Negro members. In the actual practice of law so great are the limitations in the South that the majority of Negro lawyers have settled in the North." M. Davie, NEGROES IN AMERICAN SOCIETY 118 (1949). The late Judge Raymond Pace Alexander spoke in 1941 in behalf of the necessity of a black bar association-the National Bar Association-as follows:

Just so long as we are compelled to recognize racial attitudes in America, and the positive refusal to admit the Negro lawyer to membership in the Bar Associations of the South or even to permit them to use the libraries, just so long as the Negro lawyer is restricted in his membership in local Bar Associations in the North, and particularly, so long as the American Bar Association for all practical purposes refuses to admit Negroes to membership, then so long must there be an organization such as the National Bar Association. Certainly all of us shall welcome the day when racial animosities and class lines shall be so obliterated that separate Bar Associations, other separate professional associations as well as separate schools will be anachronisms.

Alexander, "The National Bar Association-Its Aims and Purposes," 1 Nat'l B.J. 2 (1941). See also Reflections, 1 BALSA REPORTS 8 (1973) (reprint of excerpts from Judge Alexander's speech). Cf. J. Auerbach, Unequal Justice (1975).

7 The Interstate Commerce Commission was already functioning, of course, but its primary task seems to have been the regulation of railroad rates. The principal consumer-oriented federal agencies-the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Drug Administration come immediately to mind-did not yet exist.

8 It should be noted that funding for the federal courts has not kept pace with the increase in expenditures for the rest of the federal government. In 1900, the cost of the courts was one-half of one percent of the over-all federal budget. In 1975, total expenditures for the federal judiciary had declined to about one-thirteenth of one percent of the entire federal budget.

9 G. Santayana, The Life of Reason (1905) at 284.

10 I have written in greater detail on the early practices in Higginbotham, "Racism and the Early American Legal Process, 1619-1896," 407 ANNALS 1 (1973); "Race, Racism and American Law," 122 *University of Pennsylvania Law Review*, 1044 (1974); "To the Scale and Standing of Men," *Journal of Negro History*, Vol. LX, No. 3, July, 1975; "The Impact of the Declaration of Independence," *The Crisis*, November, 1975. For general background see R. Bardolph, *The Civil Rights Record* (1970); D.A. Bell, *Race, Racism and American Law* (1973) 1975 Supp.; M.F. Berry, *Black Resistance/White Law* (1971); J. Blassingame, *Black New Orleans* (1973); J. Blassingame, *The Slave Community* (1972); S. Elkins, *Slavery* (1959); P.S. Foner, *The Voice of Black America*, Vol. I and II (1975); J.H. Franklin, *From Slavery to Freedom* (4th Ed.1974); G. Fredrickson, *The Black Image in the White Mind* (1971); L. Green, *The Negro in Colonial New England* (1942); W. Jordan, *White Over Black* (1968); G. Myrdal, *An American Dilemma* (1944); B. Quarles, *The Negro in the Making of America* (rev. ed. 1969); K. Stampp, *The Peculiar Institution* (1956); C. Woodson & C. Wesley, *The Negro in Our History* (11th ed. 1966); C.V. Woodward, *Origins of the New South* (1951); C.V. Woodward, *The Strange Career of Jim Crow* (3rd ed. 1974). For the best bibliography, see A. Hornsby, *The Black Almanac* 169 (1972). For an anthology, see *Civil Rights and the American Negro* (A. Blaustein & R. Zangrando eds. 1968). The United States Commission on Civil Rights in 1961 filed a series of key documents, Vols. 1 through 5, on voting, education, employment, housing, justice. A classic report which should be particularly pertinent to lawyers is the United States Commission on Civil Rights, 1965, *A Report on Equal Protection in the South*. See particularly pages 182-188, the separate statement of Commissioner Erwin N. Griswold. A superb analysis can be found in the ANNALS, *Blacks and the Law*, May, 1973; note particularly the article of Judge William H. Hastie, "Toward an Equalitarian Legal Order, 1930-1950," at 18.

11 The first commission on civil rights appointed by any president was established by Harry Truman, pursuant to Executive Order 9808. In 1947, the President's Committee on Civil Rights filed a report, "To Secure These Rights," which stated: "Our American heritage of freedom and equality has given us prestige among the nations of the world and a strong feeling of national pride at home. There is much reason for that pride. But pride is no substitute for steady and honest performance, and the record shows that at varying times in American history the gulf between ideals and practice has been wide. We have had human slavery. We have had religious persecution. We have had mob rule. We still have their ideological remnants in the unwarrantable 'pride and prejudice' of some of our people and practices. From our work as a Committee, we have learned much that has shocked us, and much that has made us feel ashamed. But we have seen nothing to shake our conviction that the civil rights of the American people-all of them-can be strengthened quickly and effectively by the normal processes of democratic, constitutional government. That strengthening, we believe, will make our daily life more and more consonant with the spirit of the American heritage of freedom. But it will require as much courage, as much imagination, as much perseverance as anything which we have ever done together. The members of this Committee reaffirm their faith in the American heritage and in its promise." Id. at 9-10. See also Report of the National Advisory Commission on Civil Disorders (Washington, D.C., U.S. Government Printing Office, 1968); National Commission on the Causes and Prevention of Violence, Final Report, "To Establish Justice, To Ensure Domestic Tranquility," xxi, 8, 10, 13-15 (1969); 1 National Commission on the Causes and Prevention of Violence, Staff Report, "Violence in America: Historical and Comparative Perspectives," 38-41 (1968). Cf. Milton S. Eisenhower, The President is Calling 2-4 and Ch. 23 (1974).

12 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 10 L.Ed. 1060 (1842); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857); *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); *Berea College v. Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908); *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906); *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903); *Baldwin v. Franks*, 120 U.S. 678, 7 S.Ct. 656, 32 L.Ed. 766 (1887); *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883); *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876); *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563 (1876); *United States v. Powell*, 151 F. 648 (C.C.N.D.Ala.1907), aff'd per curiam, 212 U.S. 564, 29 S.Ct. 690, 53 L.Ed. 653 (1909). The following cases indicate the past problem of racial injustice and efforts to eliminate it: (1) *Voting. South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (implementation of 1965 voting rights act); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935); *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Anderson v. Martin*, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); cf. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (one man-one vote); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). See also Burke Marshall, Federalism and Civil Rights (1964). (2) *Education. Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Cumming v. County Board of Education*, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262 (1899). (3) *Housing. Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926); *Richmond v. Deans*, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128 (1930); *Harmon v. Tyler*, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831 (1927); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). (4) *Employment. Franks v. Bowman Transportation Co., Inc.*, 96 S.Ct. 1251, 44 U.S.L.W. 4356 (U.S., March 24, 1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). (5) *Public Accommodations. Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). (6) *Prohibition of racial violence. Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *United States v. Johnson*, 390 U.S. 563, 88 S.Ct. 1231, 20 L.Ed.2d 132 (1968); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

13 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

14 The Justices of the Supreme Court were not alone in their blindness to the realities of racism. Charles Warren's authoritative *The Supreme Court in United States History*, published in 1922, does not even mention *Plessy v. Ferguson*.

15 163 U.S. at 560, 16 S.Ct. 1138, 41 L.Ed. 256.

16 D.A. Bell, supra at 452; Higginbotham, 122 U. of Pa.L.Rev. at 1060-61.

17 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908).

18 See generally G. SINKLER, THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT (1972). Even the false rumor that a black had been present at an official White House function was sufficient to drive President Cleveland to frenzy, and thus he responded: "It so happens that I have never in my official position, either when sleeping, waking, alive or dead, on my head or my heels, dined, lunched, supped, or invited to a wedding reception, any colored man, woman, or child." G. Sinkler, supra at 270.

19 L. Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (Meridian ed. 1967) at 206-07.

20 Id. at 207.

21 Id.

22 The Development of Segregationist Thought 139 (I. Newby ed. 1968) (quoting 90 Cong.Rec. A1799 (1944)).

23 Id. 143-145 (quoting 90 Cong.Rec. A1801 (1944)).

24 See C.V. Woodward, The Strange Career of Jim Crow (3rd rev. ed. 1974) at 7: "The origin of the term 'Jim Crow' applied to Negroes is lost in obscurity. Thomas D. Rice wrote a song and dance called 'Jim Crow' in 1832, and the term had become an adjective by 1838. The first example of 'Jim Crow Law' listed by the *Dictionary of American English* is dated 1904." Jim Crow laws sanctioned "a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons and asylums, and ultimately to funeral homes, morgues, and cemeteries." Id.

25 Of course, law schools such as Yale, Michigan, and the University of Pennsylvania admitted women as law students decades earlier, and their alumnae have made many profound contributions to improving the legal process.

26 *Kahn v. Shevin*, 416 U.S. 351, 353, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

27 The grandfather clauses, at least, were struck down by the Supreme Court within a decade of Pound's address. *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915).

28 See, e.g., *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); and *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1924).

29 42 U.S.C. §§ 1973 et seq.

30 See e.g., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (Alabama); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (Tennessee).

31 For example, the combined impact of the reapportionment decisions and the Voting Rights Act of 1965 significantly increased the number of black elected officials in seven southern states. See U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After (Jan. 1975), reproduced in D. Bell, supra (1975 Supp.) at 2: "There is no available estimate of the number of black elected officials in the seven States before passage of the Voting Rights Act. Certainly it was a small number, well under 100 black officials. By February 1968, 156 blacks had been elected to various offices in the seven States. This total included 14 State legislators, 81 county officials, and 61 municipal officials. *** "More recent statistics show greater progress in electing black officials. By April 1974, the total number of black elected officials in the seven States had increased to 963. This total included 1 Member of the United States Congress, 36 State legislators, 429 county officials, and 497 municipal officials. *** "In all of the covered Southern States there are now some blacks in the State legislature and in at least some

counties of each State there are blacks on county governing boards. Although the number of offices held by blacks is rather small in comparison to the total number of offices in these States, the rapid increase in the number of black elected officials is one of the most significant changes in political life in the seven States since passage of the Voting Rights Act."

32 369 U.S. at 266, 330, 82 S.Ct. 691, 7 L.Ed.2d 663.

33 377 U.S. at 624-25, 84 S.Ct. 1362, 12 L.Ed.2d 506.

34 377 U.S. at 566, 84 S.Ct. 1362, 12 L.Ed.2d 506.

35 Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 Am.L.Rev. 729, 737, 35 F.R.D. 273, 280 (hereinafter "Address").

36 Address at 737-38, 35 F.R.D. 280, 281.

37 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908).

38 See *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1917), overruling *Lochner;* *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), overruling *Adair;* and *Lincoln Fed. Labor Union v. Northwestern Iron & Met. Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212 (1949), overruling *Coppage*.

39 Even the most casual perusal of Pound's other writings reveals his own continuing advocacy of reform of the criminal justice system as well. See, e.g., Pound, "Do We Need a Philosophy of Law?," 5 Colum.L.Rev. 339, 347 (1905); R. Pound and F. Frankfurter eds., Criminal Justice in Cleveland (1922); and R. Pound, Criminal Justice in America (1930).

40 Petitioner's Brief for Certiorari at 4, *Hamilton v. Alabama*, 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964).

40a It should be noted that significant changes have been made in the Alabama court system under the leadership of Chief Justice Howell Heflin. A recurrence of the *Hamilton* case is unlikely. See Peirce, "Alabama's State Courts: A Model for the Nation," *Washington Post*, May 12, 1975, at A25.

41 A. de Toqueville, I Democracy in America (P. Bradley ed. 1945) at 290.

42 Address at 740.

43 See McDougal, Lasswell and Chen, "The Protection of Respect and Human Rights: Freedom of Choice and World Public Order," 22 Am.U.L.Rev. 919 (1975). See also McDougal, Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies, 14 Va.J. Int'l L. 387 (1974); McDougal, Lasswell & Chen, Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, 63 Am.J. Int'l L. 237, 264-69 (1969); Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948). A collection of the more important global human rights prescriptions is conveniently offered in United Nations, Human Rights: A Compilation of International Instruments of the United Nations, U.N. Doc. ST/HR/1 (1973). Other useful collections include: Basic Documents on Human Rights (I. Brownlie ed. 1971); Basic Documents on International Protection of Human Rights (L. Sohn & T. Buergenthal eds. 1973).

IS THE ADVERSARY SYSTEM WORKING IN OPTIMAL FASHION?

by WALTER V. SCHAEFER [a4]

Justice, Supreme Court of Illinois

My assigned topic, "Is the adversary system working in optimal fashion?" does not involve a comparison between the adversary system and other judicial systems. My own view is that the system employed in the civil law countries of Europe, to which we have closed our minds by the epithet "inquisitorial," has much to recommend it. But as Mr. Justice Holmes said in 1911, "[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." [1] Certainly the civil law system warrants examination and experimentation which it has not so far received in this country. In the years ahead our parochial attitude will change, I think. The world

is smaller now, materials are becoming increasingly available, and our current generation of law students is now exposed to comparative law to a degree that did not exist a generation ago.

The assigned question, whether the adversary system is operating in optimal fashion, immediately prompts another: What ***160** is the purpose of the adversary system. The fundamental purpose of that system, as I see it, is the ascertainment of the truth with respect, most frequently, to an event which took place in the past. All aspects of the adversary system must be measured, in my opinion, against that objective. There are peripheral considerations, but the ultimate question is whether the adversary system as we know it today is doing the best that it can to determine the truth with respect to litigated controversies.

In other words, our task is not to determine whether the adversary system is the best possible method of arriving at the truth; rather it is to determine what changes, what adaptations within the broad outlines of the adversary system may improve its performance. And in the time available I should like to put before you some disjointed comments on what I think are serious shortcomings of the system as it operates today.

Much of the current dissatisfaction with the adversary system stems from the use of the jury in the trial of civil cases. Contrasted with the earlier methods of arriving at the truth-the ordeal, trial by battle, and compurgation-the jury trial had an obvious appeal to our English ancestors in the 13th and 14th centuries. But the jury has long since been discarded in England in the trial of ordinary common law actions.

Dissatisfaction in this country is not new. In 1872, Mark Twain observed that "[t]he jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago." [2]

Writing in 1925, Judge David W. Peck made these comments upon the jury system: "The jury system has been taken for granted and assumed to be good, although ours is the only country in the world which any longer attempts to handle the bulk of its civil litigation by jury trial. There is still good reason to adhere to the jury system in serious criminal cases. But on the civil side, it is quite time to question the value of the jury system and at least see what effect it is having on the administration of justice." [3]

The late Judge Jerome Frank did not mince words, either. He said that experienced persons believe "that of all the possible ways that could be devised to get at the falsity or truth of ***161** testimony, none could be conceived that would be more ineffective than trial by jury." [4]

Two years ago in the American Bar Association Journal, Judge Edward Devitt said this: "Compulsory use of juries in civil cases is an unnecessary, time-consuming, and costly appendage to our system of justice and does not well serve either the litigants or the public." He pointed out that a judge alone hears equity, admiralty, and maritime matters, naturalization and immigration issues, bankruptcy cases and *habeas corpus* petitions. "There is no jury trial," he said, "in Federal Tort Claims Act, Miller Act, Tucker Act, or Longshoremen's and Harbor Workers' Compensation Act cases. The National Labor Relations Act does not provide for jury trials. There are no juries in the Tax Court, the Customs Court, or the Court of Claims. Patent matters are tried to the court. Many administrative agencies, including the Interstate Commerce Commission, decide issues without the assistance of juries. In general, all statutory proceedings created since 1789 have no provision for and the Constitution does not require jury trial." [5]

There have been many tinkerings with the jury system. Six-man juries are employed regularly in many of the United States District Courts and majority verdicts have also received constitutional sanction and are sometimes employed. In addition to changes in the composition of the jury, many states have evolved methods of restricting the use of the jury. Small claims courts have been established, and fees for the calling of the jury have been imposed. Special techniques

like the auditor system in Massachusetts for the disposition of automobile cases and the arbitration system employed in Pennsylvania in small claims cases have been evolved. These devices are not to be criticized, but they do not reach the major defects.

One of these major defects is the extent to which trial by jury delays the disposition of cases. The careful study of Professors Kalven and Zeisel shows that on the average it takes 40 percent longer to try a case to a jury than to a judge. [6] If the result of a jury trial was qualitatively superior to that of a bench trial-that is, if the verdict of the jury more nearly approximated the truth than the finding of the judge-this loss of time would be justified. There has been, however, no such demonstration.

***162** The Kalven-Zeisel study compared the time consumed in actual trials before juries and before judges. But there are other factors that cause delay that were not measured. For a jury trial it is necessary to assemble at the same place at the same time, the judge, the twelve jurors, the alternates, counsel and witnesses. In such a situation the delay potential of the ordinary vicissitudes of life-a fall on the ice, illness or death in the family, even the common cold-are greatly increased. By way of contrast, in a non-jury case it is not necessary that the trial be one continuous unbroken progression from beginning to end; it is possible to hear the testimony more or less at the convenience of the witnesses and the court.

Dissatisfaction with the jury is most acute today in the area of medical malpractice and it is manifested in statutes which call for the use of screening panels of doctors and attorneys. The role of these panels is to hear evidence and appraise cases before they are permitted to go to trial. Under some statutes the determination of the panel may be put before the jury with other evidence, and under others judgment may be entered on the panel's determination. Costs, including attorney's fees, may be awarded upon the panel's determination. To date, so far as I am aware, no reviewing court has passed upon the validity of these statutes.

Doctors are not alone in their discontent with the jury. They are joined today by architects and engineers who would also like to avoid the submission of malpractice cases to juries. [7]

The disenchantment of these professional groups stems from a feeling that their cases involve technical questions which are beyond the competence of a lay jury. This feeling has considerable basis. The long interruption in a juror's everyday life, and the minimal compensation, provide great incentive to avoid jury service, an incentive encouraged by the statutory provisions for exemption and excuse from jury service which tend to eliminate from the jury those who are best qualified to serve on it. The feeling also reflects a concern that a jury's award of damages tends to include a large ingredient of sympathy for the injured plaintiff, and a contingent fee for his attorney.

To control the tendency of the jury to draw upon sympathy for the plaintiff in reaching its verdict upon liability, the law relies upon the standard instruction of the judge that the issues of liability and of damages are to be considered separately and ***163** in that order. The use of split verdicts, that is, a verdict first upon liability and then a separate submission of the issue of damages has been suggested as a method of cutting down the delay that is attributable to jury trials. Such an experiment was conducted and, as anticipated, it demonstrated that separation of the issues of liability and damages would indeed save time in jury deliberation because it would eliminate the necessity for the jury to consider the question of damages in those cases in which the defendant was found not to be liable. [8]

The experiment was successful insofar as cutting down delay is concerned, but the split verdict has been criticized on the ground that it alters the substantive results of jury verdicts. Critics have said that plaintiffs often regard split trials as a "headache," and it has been pointed out that "[n]o one can calculate precisely what difference it makes for the result of a particular case, to blindfold the jury to the damage evidence when it determines liability, but there can be no question from the [University of] Chicago data that, as an actuarial matter, two-stage trials produced more verdicts for defendants than unified trials would have produced in the same cases." [9] The criticism is a surprising one, for one of the goals of

the split jury verdict has been elimination of the injustice that may result-either to plaintiff or defendant-by merging the questions of liability and damages. The criticism seems to be based upon the assumption that it is proper for the jury to condition its determination of liability upon the extent of the damage suffered by the plaintiff, and vice versa. If this is the proper method, the jury should be so instructed. They ought to be told, for example, that "in determining whether the plaintiff is entitled to recover damages from the defendant, you are to consider the extent of any injuries, disabilities and ailments suffered by the plaintiff."

It is curious that with all of our concern in the civil law for precise findings to support the decisions of judges and skilled administrative tribunals, the divergent results reached by juries have received little attention. Each jury, although an *ad hoc*, untrained and unskilled tribunal, is able to express its conclusion in an inscrutable verdict.

The institution of trial by jury would probably long since have been discarded if the constitutional provision had been applied ***164** literally to all types of controversies. It was saved by several factors, among them the development of administrative agencies. Those agencies did not exist at common law; there was no precedent for the assertion of a right of trial by jury, or if there was such a precedent it was not generally known, and so the analogy was made to the action in equity rather than to a common law action. [10]

Recently the Third Circuit Court of Appeals was confronted with a constitutional attack upon a provision of the federal Occupational Safety and Health Act which empowers the Commission to assess what is denominated a "civil penalty" against persons found to have violated the Act. [11] The constitutional challenge was two-fold: That the Act violated Article III, section 2, which requires that the trial of all crimes shall be by jury, and that even if the procedure for collecting the penalties were deemed civil in nature, there was nevertheless a violation of the seventh amendment's guarantee of trial by jury. The court rejected each challenge, though not without difficulty. The case was first heard by a panel of the court, and then, a year later, was reheard by the court sitting *en banc*. The Supreme Court has now granted *certiorari*. [12]

If the Act in question should be invalidated, the ultimate impact would be immense for there are scores of federal and state laws with procedures whereby penalties are assessed and collected without trial by jury. The areas of workmen's compensation, taxation, environmental control, to mention but a few, spring to mind.

The significance of the case, to my mind, is that it dramatizes in an extreme form the basic problem with regard to juries. The federal constitution, and most state constitutions as well, guarantee jury trial, and until we change them we have to live with them. Yet it is only because distinctions and qualifications have been engrafted upon the constitutional guarantees that we have been able to cope with the demands of our complex society.

***165** The easy way is to go on as we are, tolerating in many jurisdictions the revolting spectacle of lawyers engaged in efforts to indoctrinate jurors in the course of the *voir dire* examination, and assuming that jurors follow the instructions of the court, even though we know better. "[A]ll experience hath shown," says the Declaration of Independence, "that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." The jury is an accustomed form, but the time is ripe to consider whether that form, valuable as it may be in criminal cases, has not outlived its usefulness in the world in which we live today.

Since the normal function of the adversary system is to determine the truth as to a past occurrence-a determination to be made largely upon the oral testimony of witnesses-it is critically important that those witnesses tell the truth. All too frequently, they do not do so.

I am not competent to explore the psychological causes of false testimony, and I do not propose to engage the problem of the ethical responsibility of the lawyer who is aware that his client has committed or is about to commit perjury. With respect to the latter problem, however, I cannot resist observing, since we put such emphasis today upon the competence

of counsel, that the attorney who knows that his client is about to commit perjury is at a minimum obligated to warn him that perjury is a crime and to advise him of the consequences of that crime.

Unfortunately, one of the difficulties with the operation of our adversary system today is that the crime of perjury does not carry with it consequences that are adequate to deter the commission of the offense. I do not mean that the prescribed punishments are inadequate. The simple fact is that perjury goes unpunished because it is not prosecuted. It has been reported that the total number of perjury prosecutions commenced in all United States District Courts during the five fiscal years 1966-1970 was 335, and that as of June 30, 1966 only 11 of the more than 21,000 prisoners in federal institutions had been sentenced for perjury. In 1972 Pennsylvania reported 24 cases of perjury among more than 72,000 defendants, and in California 53 charges of perjury were included in the total of more than 88,000 felonies prosecuted. [13]

***166** There was perhaps a justification for the willingness of prosecutors to overlook the offense of perjury in the days when proof by two witnesses was required to establish the falsity of testimony, and when it was necessary not only to show two contradictory statements under oath, but also to show which of the two statements was false. These procedural barriers are of diminished significance today, and should, in my opinion, be eliminated everywhere. For many of our citizens the oath has lost its religious significance. If we are to have a healthy adversary system, its legal significance must be emphasized.

The celebrated speech made here by Dean Pound in 1906, from which this Conference takes its title, was limited to an inquiry into civil litigation. No inference can be drawn from that limitation, however, that Pound considered the criminal law beyond criticism. Indeed, he was concerned throughout his professional life with the criminal law. Among his writings is a paper which was apparently presented the very next year at the Proceedings of the American Political Science Association, bearing the formidable title, "Inherent and Acquired Difficulties in the Administration of Punitive Justice." [14]

Many of the difficulties to which he points in the criminal law field are closely similar to those discussed in his better known address of 1906. As on the earlier occasion, Pound began by dividing the difficulties into those which were inherent, and those which "have been acquired in the history of our legal system generally, in the history of our criminal law and procedure in particular, or in the circumstances-the environment-of judicial administration in America." [15]

I wish to focus first upon an aspect of criminal procedure which Dean Pound found unsatisfactory, and for which he proposed a specific remedy back in 1907. This is his suggestion that there should be a "legal mode of interrogation of suspects taken into custody." He said:

> "Another serious difficulty in our criminal procedure is the lack of any legal mode of interrogating the accused. Hence the rich malefactor takes the advice of counsel, shuts his mouth, and leaves the prosecution to prove what it may. The poor malefactor is 'sweated' by the police till some ***167** sort of concession is extorted. Immunity of accused persons from all interrogation, if they are firm, well-advised, and able to give bail, is a most effective shield of wrongdoers. Knowledge of this leads police and detectives into lawless modes of getting what cannot be had lawfully whenever the poor and defenseless are in their custody. Granting all that may be said as to the abuses to which a legal form of interrogation is liable, the fact remains that the common-law immunity operates unequally and invites oppression and lawlessness. It is not better to have some legal mode of interrogation, under legal restrictions, than to compel officials to violate legal rights in order to enforce the law?" [16]

In 1932 Professor Paul Kauper of Michigan put a proposal for legalized interrogation into the stream of legal literature with his article entitled "Judicial Examination of the Accused-A Remedy for the Third Degree." [17] And in 1934 Dean Pound returned to the subject in an article entitled "Legal Interrogation of Persons Accused or Suspected of Crime." [18]

Both Dean Pound and Professor Kauper were concerned with the fact that in the absence of a legal method of interrogation of a suspect of a crime, the police resorted to physical coercion. *Miranda v. Arizona* [19] attempted to solve this problem, and that decision has eliminated the inequality of treatment of which Dean Pound complained. Despite the *Miranda* warnings, a considerable number of inculpatory statements are still made. My amateur suspicion is that this may be due to inner psychological compulsions which prompt an attempt to explain away any suspicion of misconduct. When cases involving statements to police officers go to trial today, the dispute between the testimony of the police officers and the accused concerns the adequacy of the admonition given to the defendant, rather than the physical treatment he received. While *Miranda* has not entirely cut off the flow of inculpatory statements, it has had the effect of eliminating physical coercion, or drastically reducing it.

I base this statement upon my own experience, which in this area goes back to 1951. In my first years on the Supreme Court of Illinois, claims of physical coercion were frequent. Such a claim is virtually unknown today. And the fact that there are ***168** so few claims of physical mistreatment is adequate assurance to me that there is little or no physical mistreatment. That assurance rests firmly on my belief that whatever may be the faults of today's lawyers, they have no inhibitions about advancing claims of illegality on behalf of defendants in criminal cases. It would seem, therefore, that while the *Miranda* warnings have not had an inhibiting effect upon the suspect, the very fact that they are required to be given by the officers has had an inhibiting effect upon the officers. And that may be *Miranda's* most significant affirmative contribution.

Back in 1966, two months before *Miranda* was decided, I had advanced a proposal, based upon the work of Dean Pound, Paul Kauper, and Lewis Mayers. [20] That proposal, briefly summarized, provided for an in-custody interrogation promptly following arrest, to be conducted by police officers before a judicial officer, with the proceedings recorded. A key element in the proposal was the proposition that at an ensuing trial the refusal of a defendant to respond to questioning at his interrogation could be the subject of comment. That proposal was endorsed and improved upon by Judge Henry Friendly, [21] and it was favorably commented upon by Messrs. Leon Jaworski, Ross L. Malone, Lewis F. Powell and Robert G. Storey, in their statement of additional views as members of the President's Commission on Law Enforcement and Administration of Justice. [22] Recently it has been reexamined and revisions have been suggested by Professor Yale Kamisar of the University of Michigan. [23]

Curiously, the opportunity to adopt such a method as a means of remedying the abuses of police interrogation had become less feasible by 1966 than it had been in 1907 when Pound spoke, or in 1932 when Kauper wrote. In those earlier years it was not generally supposed that the privilege against self-incrimination had any application to custodial interrogation. It was not until 1936 that the Supreme Court of the United States held that *any* federal constitutional right was violated by the use of a coerced confession, and to the extent that the constitution was ***169** involved it was the due process clause which, until the 1960's, formed the basis for excluding the confessions from evidence on the ground that they were involuntary and untrustworthy. But by 1966 the doctrinal climate had changed. *Escobedo v. Illinois* [24] had then been decided in 1964, and in 1965 the Court in *Griffin v. California* [25] held that the fifth amendment forbade comment to the jury on a defendant's failure to testify.

I still believe that open interrogation by police officers before a judicial officer is desirable and necessary, and that a defendant should be warned that his failure to respond might be the subject of comment at a subsequent trial. The opinion of the majority of the Supreme Court which struck down California's constitutional provision which permitted comment upon the defendant's failure to answer rested primarily on the language used in an earlier opinion of the Supreme Court

which related to a federal statute. Comment upon a defendant's silence is not the kind of compulsion at which the fifth amendment was aimed. As stated in the dissenting opinion of Mr. Justice Stewart in *Griffin v. California*,

> "Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced." [26]

It has always been difficult to keep procedural rules within bounds. Over the ages they have sought, often successfully, to dominate the substantive issue and to control the disposition of the case. So it is with the privilege against self-incrimination. The principal reason that it has been difficult to keep that particular procedural rule within sensible bounds is that it has been very difficult to determine its purpose. The language is simple ***170** enough-"No person *** shall be compelled in any criminal case to be a witness against himself"-but there has been much vacillation as to its purpose. It has now been determined that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction" and also that the privilege "is not an adjunct to the ascertainment of truth." It is also clear, it seems to me, that the privilege does not protect, except in a completely accidental way, any right of privacy.

Last month a new justification for the privilege against self-incrimination was advanced by the Supreme Court. In *United States v. Garner*, [27] the Court characterized the fundamental purpose of the fifth amendment as the "preservation of an adversary system of criminal justice." And my submission would be that an adversary system of justice would be in no way impaired if comment was permitted upon a defendant's failure to respond to questions put to him by a judicial officer.

One of the major causes of dissatisfaction with the administration of criminal law today is that a criminal case seems never to end. Always there is another attack, either in the state court or in the federal court. I think all of us would agree that collateral attack should be permitted when there is genuine doubt as to the guilt of the defendant. The problem, however, is that most collateral attacks today do not involve any issue with respect to the guilt or innocence of the defendant. What happens in a great many cases is that the attorney for the defendant, whether retained or appointed, feels obligated to raise every conceivable objection against the chance that his failure to do so may result in a charge of incompetence against him, advanced by a successor attorney. The result is that collateral attacks upon judgments of conviction, whether based upon trial or upon pleas of guilty, are all too frequently divorced from any suggestion that the defendant is not guilty of the offense charged. Typical of these cases, of course, are those involving claims under the fourth amendment. Almost never in these cases is there any doubt as to the guilt of the defendant. The evidence produced by the search which is challenged as illegal under the fourth amendment very often, indeed in almost all instances, goes a long way to establish the defendant's guilt.

Here it is that the sporting aspect of the trial becomes most offensive. A defendant has nothing to lose by a succession of ***171** attacks upon his judgment of conviction, for if they are successful the result is a vacation of the judgment of conviction with the assurance that upon a retrial he will be no worse off than he is at the time the claim was asserted. There is every incentive therefore to continue the attack even though every means would seem to have been exhausted and the cause hopeless. The appropriate remedy, in my opinion, was suggested more than five years ago by Judge Henry J. Friendly in his Ernst Freund lecture at the University of Chicago. [28] His thesis was that with "a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a

colorable claim of innocence," and his article discussed in detail the applicability of his proposal in most of the more familiar situations. [29] That proposal has not, in my opinion, received the consideration it deserves.

Under the fourth amendment the sanction for illegal searches and seizures is the exclusion of the evidence produced by the illegal search. The exclusionary rule has been unsatisfactory since its inception in 1914. [30] It operates only in those cases in which the search has produced evidence that establishes or tends to establish guilt, and then it operates always to exclude relevant evidence. As a sanction, it does not bear upon the perpetrators of the wrong. It benefits the guilty defendant and it punishes the public rather than the offending officer. It has had little or no deterrent effect upon the police, and it has been suggested that the exclusionary rule itself has been responsible for widespread perjury by police officers. In a brief filed in the New York Court of Appeals, District Attorney Frank Hogan stated:

> "For the last ten years participants in the system of justice-judges, prosecutors, defense attorneys and police officials-have privately and publicly expressed the belief that in some substantial but indeterminable percentage of dropsy cases, the testimony [that a defendant dropped narcotics or gambling slips to the ground as a police officer approached him] is tailored to meet the requirements of search-and-seizure rulings" and "it is very difficult in many [such] cases to distinguish between fact and fiction." [31]

***172** It is imperative, I think, that we find a control technique other than the exclusionary rule. I wish that I had a pat solution, but I do not. To allow recovery of damages from the offending officer would seem appropriate only in the cases of deliberate abuse; in many cases the officer must act upon a flash judgment, often in a highly dangerous situation.

Judge Carl McGowan of the Court of Appeals for the District of Columbia has suggested that the support of the police for enforcement of the fourth amendment might be enlisted if those officers were enforcing rules made by the police officers themselves, rather than the requirements formulated by cloistered judges. [32] As Professor Harold Berman has said, "Law has to be believed in, or it will not work. It involves not only man's reason and will, but his emotions, his intuitions and commitments, and his faith. [32a] Rules so formulated would have the respect of the officers and would probably therefore have a greater educational value than the suppression of evidence upon the trial of the case, which from the point of view of the police officer has only the effect of letting a guilty man go free. "[D]irect discipline imposed by the police internally," Judge McGowan pointed out, "is far more likely to deter than remote exclusions of evidence in criminal trials." [33]

Because the exclusionary rule is available only to those who are formally charged with an offense, it does nothing to curb the use of stop and frisk as a technique of harassment. This evil could be attacked directly by rule or by legislation. "A requirement, for example, that an officer who stops a citizen and frisks him must report the circumstances in writing and in full detail, would tend to reduce abuses and to insure that police officers are always conscious of the necessity that every such detention be justified. And since the victim of the unwarranted stop and frisk which does not lead to arrest is unlikely to complain because of inertia, lack of time, fear of retribution or a host of other reasons, it might be desirable also to authorize the institution of disciplinary proceedings based upon such reports, by persons outside of the law enforcement agency." [34]

***173** A frequently voiced complaint about the administration of the criminal law is that the severity of the sentence which a defendant receives depends upon the identity of the trial judge. In the case of the lay public, the complaint usually takes the form that a particular sentence is too lenient. Judges themselves, although less ready to criticize particular determinations, are nevertheless well aware that disparities do exist.

The problem, of course, is by no means peculiar to our day. Dean Pound referred to it in his article on the criminal law which I mentioned earlier. [35] And Mr. Justice Jackson, when he was Attorney General of the United States, once said:

> "It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should depend in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition." [36]

Pound classified disparity in sentencing as one of the difficulties which he called inherent rather than acquired. The criminal law typically provides a range of sanctions which may be visited upon an offender, and the choice of a criminal sanction within the permitted statutory range which is appropriate to the offense is at best an exercise with incommensurables. It is of somewhat the same order of difficulty as translating pain and suffering caused by a personal injury into a specific dollar figure which will constitute proper compensation. We recognize that the latter cannot be calculated with precision, but since it is buried in the impenetrable verdict of a jury, we have tended to accept it without question.

Appellate review is not a complete solution, for not all appellate courts have the power to review sentences. And where the power exists it is infrequently exercised, for it is generally recognized that the trial judge is in a much better position to make an informed determination.

Two devices have been suggested whereby sentencing disparity might at least be reduced. One is that the trial judge be required to make findings on any issues of factual matters which are relevant to his sentencing decision, and that he state his reasons for that decision. Such a procedural device has been advocated by Professor Kenneth C. Davis [37] and is included in A.B.A. Minimum ***174** Standards for Sentencing. [38] That solution, however, is accompanied by the certainty that whatever reasons are stated will become the subject of subsequent appeal.

The second procedural device to reduce disparity is the establishment of a sentencing council in which the sentencing judge consults with other judges of the same court before he reaches a decision on what disposition to make of the defendant. That proposal is also approved in the A.B.A. Minimum Standards of Sentencing. [39]

In this matter as in others, the pendulum effect of procedural reform is apparent. Not long ago, the indeterminate sentence and parole were widely acclaimed as humanizing developments which permitted the courts to take greater account of the rehabilitative goal of criminal law as distinguished from its retributive and deterrent goals. Now the current of opinion seems to have been reversed, and leading penologists recommend fixed rather than indeterminate sentences.

Another aspect of our criminal system that is widely discussed and frequently criticized in current legal literature is the negotiated or bargained plea. The practice is by no means a novel one. It has been pointed out that in 1925, for example, 88% of all convictions in New York City were the result of guilty pleas, as were 85% in Chicago, 86% in Cleveland, 95% in St. Paul, and 81% in Los Angeles. [40]

The ultimate determination of the A.B.A. Minimum Standards Committee, in which I heartily concurred, was to recommend that a practice which had existed for generations, be recognized, formalized, and brought out into the open. The Standards were designed to accomplish that result. Prominent in the minds of the members of the Committee was the notion that the acknowledgement of guilt is a first step toward reformation. Many other justifications for plea bargaining are stated in the opinion of the Supreme Court in *Santobello v. New York* [41] and by Chief Justice Breitel in his opinion in *People v. Selikoff* [42] in which the Supreme Court denied *certiorari* last year.

***175** Much of the argument against the negotiated plea seems to me to be unrealistic and to proceed in an artificial world. The defendant knows whether or not he is guilty. It can be said, of course, that the notion of guilt implies an understanding of the law, which a defendant may not possess. But it is also true that the defendant knows what he did, and when he pleads guilty after having received the advice of counsel and the admonition of the court, I see no reason why his acknowledgement of guilt, and his rejection of the opportunity to gamble that the state may not be able to prove what he did, should not be recognized.

Criticism of the negotiated plea seems to rest largely upon our procedural doctrine that in a criminal case guilt must be established beyond a reasonable doubt. That procedural rule, however, like all others, must be applied in the light of its purpose. Its purpose is to avoid, insofar as possible, the conviction of an innocent man. The rule does not exist for its own sake as a part of a procedural game which every defendant in a criminal case must have an opportunity to play.

Our emphasis today, as it was seventy years ago, has been upon the causes of dissatisfaction with the law. The dramatic changes that have taken place since 1906 in the world in which we live have been emphasized by the Chief Justice and others. But great changes have also taken place in substantive and procedural law during those intervening years, and we must not minimize them.

Unless you could afford a lawyer, you could not have one in a criminal case in the federal courts until *Johnson v. Zerbst* was decided in 1938, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461. Since then the bar has met the challenge of an undreamed-of expansion of the right to counsel, both in criminal and in civil cases. The 1906 lawyer would not recognize civil procedure as it exists today, with relaxed pleading standards, liberal joinder of parties and causes of action, alternative pleadings, discovery, and summary and declaratory judgments. Today, they are familiar, and curiously and perhaps inevitably, some of them have become themselves the subject of criticism.

It may seem anomalous that some of the changes that were hailed as significant procedural reforms when they were inaugurated, should today be the subject of criticism. But if we look at the matter objectively, we must realize that a static procedural system is quite as unsatisfactory as a static body of substantive law. As I have mentioned, the jury was a great improvement when it supplanted trial by ordeal, trial by battle, ***176** or compurgation. Like our doctrines of substantive law, our procedural rules are molded by the impact of the situations presented to the courts-situations that are churned up out of the raw stuff of life, and our procedural rules like our substantive rules must be remolded in response to the impact of those forces. The sad day for this nation will come when lawyers and judges no longer meet with open minds to review causes of dissatisfaction with our present legal system and to take new directions for the future.

a4 I am indebted to my friend, Roland D. Whitman, for his assistance in preparing this paper.

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HOW WE CAN IMPROVE JUDICIAL TREATMENT OF INDIVIDUAL CASES WITHOUT SACRIFICING INDIVIDUAL RIGHTS: [1] THE PROBLEMS OF THE CRIMINAL LAW

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"The land is full of bloody crimes, and the city is full of violence." Most of us would agree that this is an accurate account. The reporter was not, however, a newspaper columnist but a prophet named Ezekiel, who observed events about 2500 years ago. [2]

***177** Seventy years ago, when Dean Pound spoke only a few miles from our conference hall today, he limited his inquiry to civil justice. He said:

> "[T]he true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history." [3]

But, as Dean Pound had recognized a year before, the public was even then profoundly dissatisfied with the working of the criminal law. [4] The social disease from which we are now suffering had already infected the body politic. [5] It has since reached malignant proportions. Last year, President Ford, reflecting the sentiments of the nation, said,

> "The personal and social toll that crime exacts from our citizens is enormous. In addition to the direct damage to victims of crime, violent crimes in our streets and in our homes make fear pervasive. In many areas of the country, especially in the most crowded parts of the inner cities, fear has caused people to rearrange their daily lives. They plan shopping and recreation during hours when they think the possibilities of violent attacks are lower. They avoid commercial areas and public transit. Frightened shopowners arm themselves and view customers with suspicion." [6]

Our daily conversations with our neighbors reflect this ever-present anxiety. They and we deplore the lack of safety in the streets, and exchange stories about the assault, the mugging, or the burglary that either we or some friend recently

suffered. Crime has joined the move to the suburbs and to middle class neighborhoods. Our complacency has been shattered; the structure of our lives has been altered.

***178** The public is concerned not only with what happens on the streets but with what is going on in the courts. Indeed it attributes the blame for what is happening to the courts. Most complain that they are too slow, or too lenient, or that they coddle criminals. Other critics, who have a different attitude about the criminal law, criticize the courts because sentences are punitive, and prisons do not rehabilitate; because the system oppresses the poor and is manipulated by the rich; and because courts are part of an establishment that condones crime in high places.

The police criticize the courts as a legal maze erected to protect criminals. Victims are shabbily treated and frequently come away from court feeling as if they were on trial. Witnesses wait interminably, and frequently must return innumerable times because the court condones postponements. Jurors are often treated worse than the defendants who are on trial. Few who come in contact with the criminal courts come away without serious complaint.

Yet a majority of the lawyers are complacent. They can ignore what is happening because by and large they practice civil law. They assiduously avoid the criminal courts. They neither know nor really care, except as laymen, about the unsavory business of the criminal law. Their smugness is repugnant. But their disdain for the seamy social apparatus that is euphemistically called the criminal justice system is warranted.

Those of us who are judges sit in our walnut-paneled courtrooms and pride ourselves on the impartiality with which we enforce venerable abstract principles and legal safeguards for the innocent. [7]

If we think these concepts epitomize the criminal law in action, we delude ourselves. We mislead the republic. For the courts are not performing their role adequately. One reason for this is our failure to recognize that the courts do not dominate the criminal law process. We cannot even address the public's first complaint-that the courts have caused the increase in crime, the rate of recidivism, and the lack of safety on the streets-until we understand the part the courts play in the machinery of the criminal law.

***179** The courts are but the one most visible element in a complex social institution. They do not control the system: they are, in major part, a result of it. If we would improve what happens in the trial courts, we cannot merely remodel the rules that apply once the judge dons his robe and mounts the bench.

The person caught up in the vortex knows how small a role the judge plays. Go into the corridors of any major criminal court. Ask any full time practitioner of the criminal law. Consult any prisoner. The refrain most frequently heard, the obsessive inquiry, is: What kind of deal can you get me? These participants in the criminal law process may not be versed in theories of criminology, but they do know in a pragmatic way what is important. To judges who sit in austere dignity, a recorded interview with one of their concerned observers-lately sentenced-should be illuminating:

> Question: Who runs the show?
>
> Answer: The person who runs the show is the prosecutor.
>
> Question: Well, what's the judge's job?

Answer: "The judge's job is to sit on his [epithet deleted] and do what the prosecutor tells him to do." [8]

The judge's role may be slightly more significant than this not altogether benighted prisoner suggests. But it is not so dominant as we ourselves believe.

The Chief Justice of the United States has urged us to consider that "what we must do is to be ready for the year 2000, when, in place of 200 million Americans, there will be 260 million, with social, economic, and political forces that will generate incalculable problems and conflicts to be resolved." [9] Pound warned against petty tinkering where comprehensive reform is needed. Let us not, as the Chief Justice observed we have so often done, spend our time merely "tightening nuts and bolts;" instead let us strike bold blows for justice.

I

If we ask any judge how to improve the criminal justice system, he is likely first to call for more judges. This is a reflection of the fact that courts, like other bureaucratic organizations, respond to many criticisms by invoking their need for more resources. The Chief Justice and others have eloquently ***180** expressed the urgent need for increases in the number of judges and our other institutional resources. Indeed, it is undeniable that, as Earl Johnson has pointed out in his remarks, our governments, federal and state, have been parsimonious in their appropriations for the judiciary. The workload is overwhelming. But even as we recognize this, we must also consider the fact that society will never give us all we want or even need.

The resources of the judiciary-of every criminal justice component-will always be limited. They cannot accommodate an infinite number of defendants charged with an almost limitless variety of crimes.

Many actions are declared lawless that it is inappropriate for our society to handle as crimes. [10] Judge Rifkind has already discussed the possibility of decriminalizing certain kinds of behaviour. [11] Our law-makers must also consider whether law-makers should leave other kinds of human conduct entirely to individual discretion; whether society should attempt neither to forbid them as criminal nor to regulate them in any other fashion. [12]

II

Our next step in getting ready for 2001 is to examine the process of detecting those who are to be charged with a crime and bringing them to trial. When we try to do this, we find our inquiry limited by misconception, myth, and ignorance. Everyone knows that we have a crime wave: what no one knows is how many serious crimes were committed in the United States in the 199th year of our independence. Many serious crimes are not even reported. The victims say that the police can do nothing; or they prefer to suffer in silence rather than endure ***181** the added distress or indignity that would ensue if they filed complaints. The best available estimate is that in our five largest cities the victims of almost half the aggravated assaults did not complain to the police, and the victims of $^{2}/_{3}$ of the simple assaults said nothing to the authorities. [13]

None of the *un*reported crime results in an arrest. There *are* arrests after *some* of the reported criminal acts, but we don't even know how many people were arrested last year-or any year. In 1974, over 6 million arrests were reported to the FBI, the only agency that gathers actual data, but the FBI also estimates that over 3 million additional, unreported arrests were made. [14] This means about one arrest for every 20 Americans over the age of 12. The 1967 Report of the

President's Crime Commission estimated that 40% of the male children in America would be arrested for a nontraffic offense sometime in their lives. [15] Almost half our male citizens, and an increasing number of our females, will become one of these anonymous numbers that the professionals call data points; they each will become one of the human beings who are taken into police custody and permitted one phone call.

Nine million arrests were made in 1974; almost a police state, you may say. What happened to all of these people? The answer is, we don't know. We don't even know how many were charged with committing crimes.

The best national estimate is that in 1974 20% of the serious crimes reported resulted in arrest, [16] and anywhere from 25%-50% of those arrested for felonies were formally charged, [17] though there are great differences in the practice and in the estimates in different jurisdictions. Then the charges against ***182** 5% are dismissed or nol-prossed. [18] Since we don't know either the number of crimes or the number of arrests, we obviously don't know the odds that a criminal will never even be charged with a crime, or, after being charged, will be convicted. But we know that they are better than those offered against long shots at the race track and growth stocks in the market. The odds against arrest and conviction vary somewhat from crime to crime, but informed critics think that, for the whole spectrum of crimes they average about 50 to 1 that a criminal will not be imprisoned. [19] From the data available, it appears that the odds are over 10 to one that a person who commits a serious crime will never even be charged with the offense.

No punishment, however inevitable or severe, will prevent all anti-social conduct, but the concept of deterrence is sound despite the arguments to the contrary. [20] Both intuition and experience convince us that penalties are a deterrent. We may all be tempted to drive 70 miles per hour on the interstate highway, even though it is a violation of law, but only a few of us would not slow at once to 55 if we saw a highway patrol car watching us. Every lawyer who has advised a client about the differences between civil and criminal penalties for a proposed course of action knows that the criminal sanction has a salutary effect on business plans. Nor is fear of consequences confined to the middle class. Even muggers and burglars in high crime areas are deterred by the fear of apprehension. This is why we do not see them committing their crimes at high noon. So we cannot abandon the notion that the function of the criminal law-and of sentencing-is to deter anti-social conduct.

But to be an effective deterrent, the threat of punishment must be certain and swift. The criminal who need not fear apprehension will not fear jail. Hence court sentences, however severe, however mandatory, are only a mild deterrent to crime so long as there is only a slight likelihood that the sentence will ever be imposed. As we have already seen, the chances that any criminal will be caught are minimal; even for serious, ***183** reported crime the odds are 5 to 1. Many will play Russian roulette-for no gain-if the chances are six to one against self-destruction. How many will play criminal roulette when the chances are more than five to one against ever getting caught-and fifty to one against being sentenced to jail? The deterrent force of the criminal law will not be substantially increased, whatever sentences are imposed on the few who come to court, until the likelihood of apprehension is increased and the odds in favor of criminal success are reduced.

III

The criminal enforcement process begins with arrest. The Constitution contemplates release pending trial, hence its guarantee against excessive bail. Perhaps out of necessity-because the jails could not accommodate all those awaiting trial, or because the poor can usually afford no bail-we have developed an incredible American entrepreneur: the bail bondsman. The A.B.A. standards recommend the use of monetary bail only as a last resort because of its discriminatory effect on poor defendants. [21] We should take the necessary next step; the use of the professional bondsman should be eliminated. The judicial process can accord pre-trial release to the poor more equitably. [22]

We are all aware that the release of some defendants on bail presents them with an opportunity to commit further crimes pending trial. For others, the impending trial is a black blanket on life's normal processes. For defendants and society alike, speedy trial must accompany bail reform.

While the defendant awaits trial, now usually a protracted period, defense and prosecution proceed with the transaction called plea bargaining. This is the most dramatic manifestation of our tolerance of conditions that cheapen and demean the entire system by transforming what should be a search for justice into a contest of bargaining skill and power. The prosecutor knows even before charges are filed that he will need something with which to bargain, hence he elects either to charge the defendant with the most serious offense the facts will justify, ***184** or to file a multi-count indictment. Now bargaining begins, and the effort to make the deal. In some jurisdictions, the bargaining is across the board-for the reduction of the offense charged to a lesser offense, for the dismissal of one or more counts, or for an agreement concerning the length of the sentence. About 10,000 times a day in this country, lawyers are deciding whether a defendant will or will not go to jail and, if so, how long he will stay behind bars, just as if they were trading for copper jugs in a flea market.

The defense lawyer bargains in two ways. Part of his haggling is with the prosecutor: to get the best deal he can. The rest is with his client: to convince the client that the price is right.

Even in jurisdictions where the judges do not permit sentence bargaining and do not allow the prosecutor to make sentence recommendations, they tolerate count dismissals.[23] For example, the theft of a federal check from the mails and its subsequent negotiation frequently give rise to three counts-theft, possession, and forgery. A plea of guilty is negotiated on one count on condition the others be dismissed. Everyone knows-except perhaps the defendant-that in most cases the sentence will be the same whether the defendant pleads guilty to one or to all three counts. But the lawyers can preserve the illusion of concessions.

We have begun to bring the dirt from under the carpet. The A.B.A. Standards Relating to Pleas of Guilty, the Standards of the National Advisory Commission on Criminal Justice Standards and Goals, and the Federal Rules of Criminal Procedure, as recently amended, require a full recital of the agreement between the prosecution and the defendant, and forbid the judge to enter into the negotiations.[24] However, except for a proposal of the National Advisory Commission, not approved by the Courts' Task Force,[25] few have recommended flatly that we do away with plea negotiation completely. “Implicit in the standards,” the A.B.A. report states, “is the notion that the various objections to plea discussions and agreements can be overcome.” Certainly these standards represent a major advance. But we should go even further.

***185** The State of Alaska, in cooperation with the Law Enforcement Assistance Association, is now conducting an experiment to determine the effect of the elimination of plea negotiation in the court system. The results of the one-year test are expected to give a good indication concerning the possibility of a change in this practice even without other major institutional reforms.

We are told that, without plea bargaining, the courts would be inundated; the fact is that no one knows whether or not this would be true if other reforms were made.[26] What we do know is that, given present institutional habits on the part of judges, prosecutors, lawyers and defendants, all of whom react to reality, the prophecy would be fulfilled if we eliminated plea bargaining and changed nothing else. The necessity for plea bargaining results from our present practices, among them, the prosecutor's custom of charging the defendant with multiple offenses of varying severity and the unreviewable sentencing authority of trial judges. If we eliminate plea bargaining and also the practices that make it inevitable, many defendants would still find it desirable to plead guilty, ask for clemency, and accept their sentences. They would do this for a host of reasons: the remorseful defendant who admits guilt is frequently an appropriate subject for mercy; a trial may reveal evidence that portrays the defendant to the judge as an anti-social person. Lawyers and

defendants bargain when it is expected of them; if what is expected and required is either to plead or to stand trial, a different set of attitudes and practices will develop.

Although the rest of the world has court congestion and crime wave problems, the U.S. has more lawyers per capita [27] than any other nation. Yet nowhere else in the world are lawyers ***186** and courts permitted thus to bargain in human freedom. [28] Sentence bargaining results in fixing the punishment for a crime by the relative negotiating strength of prosecutor and defendant. Whatever purposes the law seeks as a result of sentencing, the bargained sentence is not designed to accomplish society's purposes if indeed society has any; it reflects, rather, the negotiating skill of traders.

That does not mean an elimination of guilty pleas. Guilty pleas will be received as they are everywhere else in the world. [29] Guilt or innocence will, however, be determined without regard to the relative bargaining abilities of two lawyers.

Meanwhile, prosecutor and defense counsel must prepare for trial. In federal courts and some state systems, limited pre-trial discovery is permitted but, by and large, counsel still conduct trial preparation in a spirit of gamesmanship. Save for what is disclosed as an incident of plea bargaining, each side jealously conceals its strategy and strives for trial surprise. We have learned that justice in civil litigation is frustrated if each side is permitted to maintain a curtain of secrecy. Criminal justice is also frustrated if trial is a game of dazzle. Discovery is not only a way to eliminate surprise and deception; it shortens trials, it focuses them on the issues that are contested, and it makes possible the stipulation of uncontested matters. [30] It sometimes eliminates the need for trial by making known early what will inevitably be proved later.

***187** The A.B.A. and the N.A.C. Standards recommend expanded pretrial discovery. [31] This need not be a one-way street with only the prosecution disclosing the evidence that it will produce at trial. [32] By the nature of the process that leads to the filing of a criminal charge and its preparation for trial, the prosecution will have more to disclose than the defense. But, within constitutional limits, disclosure should be exacted from the defendant also. [33]

Pre-trial discovery ought to include actual disclosure of all material in the prosecutor's hands that is favorable to the defendant. *Brady v, Maryland* [34] creates the possibility of a new trial if such material is withheld; we should impose an affirmative duty to disclose it in advance. If, as we profess, the duty of the prosecutor is to see that justice is done and not just to obtain convictions, we ought to pay more than lip service to this ideal. We ought to require the prosecutor to act as if he and we believed it.

Omnibus hearings have not always worked, [35] but they can succeed, given firm administration by courts or magistrates, education of the bar, and adaptation of the process to the court's case-mix. The omnibus type hearing provides a magnificent opportunity to shorten the trial, to turn up the hole cards, to reveal *Brady* material, and, in the interests of justice, to convert a game of maneuver into an effort to ascertain truth without unduly compromising the adversary process. Such a hearing may also tend to improve representation of the defendant, for the check list that is used in omnibus hearings suggests all the matters that should at least be considered.

***188** We know enough about omnibus procedure to go from the permissive to the compulsory, to require it as a stage in *every* serious criminal case. Both in omnibus and other discovery, we should except (to the extent necessary) those cases where either side can show cause why disclosure of trial items should not be required: if a witness would be endangered or evidence might be tampered with, the same interest in a fair trial that prompts disclosure in most cases should constitute reason to protect the integrity of the trial in other situations that would make disclosure unwise. But in all other instances two-way discovery, stimulated by vigorous omnibus hearings, should be mandatory. Those who dispute this may argue that the ability to deceive or surprise is an inherent part of the adversary process. Whether or not it is depends on how "trial" is defined. One can fight hard and still fight fair. [36]

We should turn attention also to the competence of counsel. Representation by incompetent or ill-prepared lawyers is still a national problem despite the guarantees of *Gideon*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, and *Argersinger*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530. The fault is not confined to appointed counsel; indeed it appears that, on the whole, appointed counsel is likely to be more diligent than the average, if seldom equal to the best. Many failures of the system are products of lawyers' delay, obfuscation and mistakes. I suspect that the defendant's personal concern for plea bargaining stems in part from his lack of confidence in his lawyer and his lawyer's advice. Courts alone cannot assure truly competent counsel; the bar must upgrade its own.

Nor should we overlook problems created by judges themselves. Those who are familiar with most inferior courts will have seen a calm, unbiased, and judicious judge consistently only on TV. The literature on this subject is vast; I remind you only that the trial's dignity and fairness can never rise above the level of the temperament and ability of the judge and the bar. Both sides of the bench require vast improvement.

The number of cases that proceed to trial is relatively small. But the trial process is profoundly important. To the defendant and the state this is not only the moment for determination of guilt or innocence, but the crucible to test the fairness and equity of the state's process. To the public this is the day of drama, the symbolic ritual.

***189** Yet, despite the importance of the public trial, the trial process in many courts appears dominated by a production ethic.[37] We "process" those charged with crime. Like any assembly line, the criminal law process has a product: "terminations" or "dispositions." The aim of the police is to "solve" crimes; their "disposition" is the arrest. The prosecutor disposes of the human beings who are referred to him by deciding whether or not to charge them with committing a crime. The court effects dispositions the easy way, if possible, by guilty plea; if not, then the court takes the difficult way, the trial: judges too measure their achievements by the number of "terminations."

Throughout the system the pressure is for dispositions. A society that prides itself on its concern for *due* process, for justice, humanitarianism and individual self worth, should be ashamed to see its foremost symbol of these values degenerate into a bureaucratic process whose single purpose is to terminate cases without adequate regard for the human destinies it affects or the social toll it inflicts not only on defendants, but on the law that it claims to enforce and uphold.

Justice should not, of course, be sacrificed for efficiency. But "efficiency" is not necessarily a pejorative term. It does not imply mere haste. Case-processing is inefficient if it is either too slow or too speedy to be effective, that is, "just." High-speed, high-volume case processing may deprive participants of the time they need to prepare for and adjudicate the case. Likewise, unnecessary delay may threaten just dispositions by keeping defendants in jail or by weakening witnesses' memories or by inducing guilty pleas. Efficient case-processing conserves the economic resources of both the litigants and the public. Beyond that, it enhances the quality of justice.

It is ironic that this disposition-oriented system is, like all bureaucracies, slow and inefficient. We have all heard, and lamented, delay in the courts. Yet there is reason to doubt that this is purely a matter, as is frequently assumed, of delay *by* the courts.[38] Delay is endemic in our system. It is, for different ***190** reasons, to everyone's advantage. The defendant may utilize delay to get a better deal in plea bargaining, or in the hope that witnesses will disappear, or to raise money to pay counsel, or simply to postpone the day of reckoning. The prosecutor may delay to build up pressure for a plea or because of overwork. The court may delay because trials are difficult and there is plenty of other work to do. The regular participants in the judicial process, prosecutor, defense lawyer, and judge, are all eager to spend as little time as possible in court;[39] delay in bringing matters to trial assists in that objective. Our criminal justice assembly line is geared to produce a product that seems almost deliberately delayed as if, like good cheese, some degree of aging were in itself a desirable quality.

When charged with delay, courts react as they do when confronted with other problems. They point to heavy caseloads, understaffing, and inadequate findings. These are all "culprits" that can neither speak back nor have any defenders. [40] Delay *can* be overcome despite such problems; the Speedy Trial Act [41] is proving this. But it requires a mobilization of will and resources. It requires preparation for trial in advance, avoidance of continuances, and resolve to enforce the constitutional mandate.

The need for speedy trial does not stem from abstract notions that efficiency is to be valued for its own sake. The deterrent value in the criminal law lies more in the certainty and swiftness of the penalty than in its severity. Our entire criminal process must be made more efficient, not only because deterrence ***191** is one of its goals but also because delay exacts a penalty from the innocent as well as the guilty, and from society. The efficiency of the criminl law can be improved without sacrifice of humanitarianism or justice. The kind of heart may move as efficiently as the tyrant and infinitely more mercifully.

If we adopted these policies, how many trials would there be? No one knows; but, even if we do nothing, there will be more than there were last year. Our present system will continue each year to produce still more trials and more appeals. The percentage of charges going to trial is increasing throughout the nation; [42] and appellate filings have risen more than 200% since 1960. [43] The reasons for these phenomena have been suggested: [44] the appeal rate is rising because appeals are relatively inexpensive or free, because defense counsel do not wish to be accused of incompetency, because there is much to be gained and little to be lost. The same factors are increasing the number of trials.

IV

Procedure in the courtroom has been considerably improved as a result of changes in state and federal procedural rules. Further improvement can be expected as the A.B.A.-N.A.C. Standards, and the Federal Rules of Evidence have their impact The 17 volumes of A.B.A. standards and that part of the N.A.C. study that deals with the role of the courts are commendable. We cannot here review the 18 volumes of these studies or even attempt a summation, [45] but attention should be paid to these works.

The trial process itself can be improved. The goal should be neither to shuffle defendants quickly to jail, nor to hasten the government to the trial unprepared, but rather to promote justice under law. Trials can be efficiently conducted without sacrificing individual rights or crippling prosecutors.

The adversary trial has been praised and damned. Justice Schaefer has just commented on it at length. But, with its beauties ***192** and its blemishes, it remains the symbolic ritual of the criminal law process. The first step in improving the adversary trial is to eliminate the inquisitional voir dire [46] that has become another of our unique American fungi, piously but erroneously equated with the constitutional right to a trial "by an impartial jury." No observer of the voir dire process as it is today conducted can doubt that each side uses it not to select an impartial jury, but to try to predetermine the result of the trial.

Every book on trial advocacy recommends that counsel begin the trial by attempting to influence the jury in the voir dire. Literature on the celebrated jury selections using social science methods-the Mitchell case for example [47] -shows that public opinion polls, biographical investigation and sociological research may be employed to try to ferret out a jury likely to reach the kind of result prosecutor or defense may wish. None of this is designed to get a fair jury. It is designed to get the kind of unfair jury that you want, a kind that is unfair in your favor, or at the worst, a kind that is not unfair in your opponent's favor.

Voir dire should be conducted by the court. It should be brief and to the necessary point. If not a facsimile of the British system-under which the first 12 called to the box are usually selected-it can still be a succinct interrogation to determine who should be challenged for cause, and to develop sufficient data to make possible intelligent use of peremptory challenges. It may be worthwhile to reappraise the desirability of allowing any peremptory challenges; but even if a few are warranted, the number allowed in many jurisdictions is excessive. Without taxing our ingenuity, we can devise a process of extracting information from juror qualification questionnaires that would cover most of what is learned in voir dire. These data can be made available to counsel in written form. The voir dire would be merely supplementary. What is wrong with our present voir dire is not merely the time and resources required; the trial process is tainted because we allow jury selection to begin in a way calculated to achieve victory at all costs, not to secure a fair trial.

While many criminal courts are conducted with dignity, there are still too many where the proceedings are held in haste, where there is neither decorum nor ever any apparent effort to seek justice. All who appear in any court should leave with the feeling ***193** that there was a serious effort by sensitive human beings to achieve a fair result.

If the court and counsel have prepared properly, the trial process will be much abridged. The foray to lay a predicate for the admission of evidence will be conducted in advance of trial because its necessity will be disclosed at the omnibus hearing. There will be a reduction in the number of motions to suppress, used so often merely as a means to discover the prosecutor's case. Those motions that should be heard will be heard in advance of trial.

Proper planning should eliminate the need for the bench conference, that grave gathering of counsel to whisper to the court, rumps to the jury. The skilled judge should be able to hold all necessary conferences at recesses.

The jury should be treated with respect and accorded the facilities that thinking people need to make decisions. They should be allowed to take notes. The charge should be written in advance and copies should be distributed to the jury. It goes almost without saying that the trial should be started on time, and recesses should be held to a minimum. There must be decent consideration for the victim and for the witnesses. The constitutional guarantee of a speedy trial may come to mean not only one that is promptly held, but one that is promptly concluded.

We cannot leave the subject of promptness without considering the trial's aftermath, the appeal. Delay does not occur only in trial courts. The time required to focus on the purely legal issues raised on appeal-in some instances the time required merely to write an appellate opinion-frequently exceeds the time elapsed from crime to verdict. This period is entirely within the control of lawyers and judges. The fault for delay here is neither in our legislators nor in our stars; it is in ourselves.

V

If the verdict is “guilty”, the defendant must be sentenced. Basic concepts of equity command that the punishment imposed should bear a reasonable relationship to the offense committed and should in addition be at least similar to the penalty exacted from others of like culpability. No one can contend that sentences imposed meet either of these criteria.

Judge Marvin Frankel has called our sentencing process “lawless.” [48] It is under attack as deplorable from critics of every ***194** persuasion, the conservative, the liberal, the law-abiding, the imprisoned, the criminologist and the taxi driver. Attorney General Edward H. Levi recently commented on the “accidental quality to the imposition of punishment,” [49] a courteous way to condemn a process that the more candid consider bizarre. [50]

There are about 25,000 judges in the country who impose sentences. Other than the occasional requirement of a mandatory sentence, there is absolutely no uniformity in the sentences they impose. It will be widely and accurately known that one judge always imposes the maximum sentence-particularly when the offender elects to stand trial. Counsel

will base their advice to defendants arraigned before this judge on what they know to be true though it is difficult to prove. Another judge will be renowned for clemency, and counsel for defendants will attempt to manipulate the docket to appear before him. Worse still, many of us who impose sentences find that we are not even consistent with ourselves.

That the problem is international does not make it tolerable. [51] Its solution must begin with a consensus concerning the purposes of sentencing. This can be developed only if the judge articulates the reasons for the sentence imposed in each case. [52] It is true that the reasons for a specific sentence are difficult to formulate and that similar explanations might account for a ***195** wide variety of sentences. [53] Nonetheless, a rational policy must begin with the requirement that every judge who imposes a sentence give the reasons for his decision-just as he would have to do if he were deciding a $50 automobile collision claim. The faculties that have enabled us to develop a jurisprudence of tort liability should enable us to supply a sound body of principles to be used in sentencing.

Pending legislation proposes to create sentencing commissions that would set sentencing guidelines. [54] If the trial judge did not set a sentence within the range set by the guidelines, he would be required to give specific reasons for the exception, and this decision would be subject to appellate review. The defendant would be required to serve the sentence imposed by the judge, with a specific amount of time off for good behavior. [55] As Attorney General Levi has noted, there has been insufficient comment on the suggestion to warrant more than its study.

Whether or not sentencing guidelines are adopted, appellate review of sentencing is essential to sentencing uniformity. Although a majority of judges oppose appellate review, the United States is the only democratic nation that does not have it. Objections to it come from appellate judges-who resist an even greater workload-as well as from trial judges-who resent invasion of an area where they have untrammeled discretion.

Just as guardians must be guarded, judges must be judged. The public needs, and is entitled to, appellate review of judicial sentencing. Review should not be limited to the reduction of excessive sentences. If it were, appellate review would simply become an effort to reduce all sentences to the lowest common denominator; its target would be merely the arbitrariness that is excessive. Permissiveness may be arbitrary too. Although there are constitutional problems involved, we should seek appellate authority to readjust the sentence to anything the trial judge might originally have imposed. [56]

***196** Let us turn to another criticism of sentences: the complaint that American judges are too lenient. The average sentence imposed by American courts appears to be longer than the average anywhere else in the democratic world. [57] In addition a greater proportion of our population is confined to jail than in any other nation for which reliable data are available. [58] On January 1, 1976, there were more than 2.1 million Americans in jail or under criminal court supervision, one-fourth as many as in all of our colleges. [59] Incidentally, it costs more to confine a prisoner for a year than to send a student to an Ivy League college. [60] This information is significant because one suggestion frequently made is that we need to build more prisons and impose longer mandatory sentences. Since we have already taken more of the medicine of confinement and long sentences than has any other free nation and still suffer from what are apparently the worst ravages of crime, it is a strange prescription that we physic ourselves more strongly. So, while I see a need for rationality in sentencing, I do not join in the call for more jails.

We know that the jail cannot rebuild the prisoner; the human being confined to an institution, like the one who is free in society, can be changed only if he desires to alter his way of life. The motivation must come from within. But we must try to furnish an opportunity for rehabilitation. Whether or not its inmates change for the better, the prison must try at least not to make them any worse than they were when they entered. [61] ***197** One of the phenomena of our criminal law enforcement system is that the more we handle individuals the worse they become. In 1970, fully 63% of federal prisoners released to the community in 1965 had been re-arrested by the fourth year after release. [62] The number of

times a person goes to jail is a reasonably accurate barometer of the likelihood that he will violate the law again. This may in part be an attribute of the offender. But some observers consider it a product of our system: our prisons are academies of crime. Surely we can make them humane as well as deterrent, and offer those who would make their lives constructive a chance to do so. [63]

VI

Neither sentencing nor prison is the end of the criminal process. We would neglect a major aspect of the criminal law if we ignored the myriad problems posed by post-conviction relief. One of the problems of our present system of post-conviction relief is the creation of needless friction between courts without much benefit to defendants. A study made by the Federal Judicial Center disclosed that, in 1969, 6,818 applications for post-conviction relief from state courts were considered by federal courts. Evidentiary hearings were held in only 5 ½% of the cases. [64] Another more recent study shows that in 1975 7,696 state petitions were considered in federal courts with only 3.6% reaching the hearing stage. It is likely that in all cases held without an evidentiary hearing, relief was denied. In 1975, it was granted [65] in about 1% of the cases where a petition was filed. Since this was usually a new trial, most of those who were accorded post-conviction relief were again tried and found guilty. Ultimate release is thus obtained in only a minute number of cases.

These few innocent defendants are entitled to a speedier review. All the cases should be heard with less intercourt friction, less duplication of judicial effort, and more efficiency. The problem would be eased if all state courts would adopt comprehensive post-conviction remedial procedures, hold evidentiary hearings when the need is indicated, and make a complete record on receipt of the initial application for post-conviction relief, ***198** including a statement of the grounds relied upon by the prisoner and the reasons for granting or denying relief. [66] This would in many cases obviate the need for overlapping evidentiary hearings. [67] Trial judges should be imaginative at the hearing and should encourage the applicant and his counsel to present all known possible grounds for relief. In many cases, it will be desirable to appoint counsel.

But we might attempt more radical treatment. I suggest a statutory remedy: provision for a single post-conviction hearing immediately after sentencing. The defendant would be given his choice of proceeding with counsel who represented him at the trial or new counsel. This would be coupled with the right, indeed the duty, to bring motions to discover favorable matter in the prosecutor's files [68] if that was not accomplished by pre-trial procedures. All possible issues raised by the record would be considered at this time. The appellate court would then review both the appeal, including the sentence, and the post-conviction application at the same time. [69] It might be assisted by special staff counsel whose duty would include searching the record for matters that should be considered to make the review complete. [70] This review should be final save for anything genuinely newly discovered thereafter-either evidence that could have been presented at the trial or, for example, evidence of concealed betrayal by counsel.

VII

This review of criminal law enforcement in the courts has been summary; volumes have been written about topics here commented on in a single sentence or paragraph. Even so, it is evident that we cannot achieve significant improvement if we continue to tolerate our basic institutional structure. Yet the most effective overhaul of the criminal law process will not return us ***199** to that happy day when household doors could be left unlocked day and night, car keys could be left safely in the ignition, and teenage girls could walk alone to the corner grocery after dark.

Crime is not created by the criminal law process; it cannot there alone be resolved. Nor is poverty alone responsible; the reasons why people violate the law are psychological and sociological as well as economic. There are no easy diagnoses of the causes of crime, nor are there easy cures. We cannot prevent millions of crimes a year by building and filling more

jails. The disease is societal, and we can no more control it in the courts alone than we could eliminate biological disease in the operating room. The courts cannot singlehandedly restore safety to the streets however just, fair, and speedy our trial processes are.

The perfect system of criminal law will never be devised. Both our constitution and our concepts of justice embody conflicting values. There is no easy harmony between insuring Domestic tranquillity and Securing the Blessings of Liberty. Yet we can no more abide being hostages of lawbreakers than we can tolerate being slaves to the state. We are prisoners now of a criminal law process we did not make, but we have a ring of keys to open its doors. Those keys include bail reform; elimination of plea bargaining; effective pre-trial discovery; prompt and fair trial procedures that consider the interests of victims, jurors and witnesses yet safeguard individual rights; reform of sentencing practices; improvement of correctional institutions; and a rational system of post-conviction remedies. With insight and action we can escape the confines of today's walls, and, outside them, build a structure that balances fairly the restoration of a safe society and the preservation of individual rights.

1 One of the few items of received wisdom in this area that I do not question is that federal judges could not function without their law clerks. I acknowledge my debt, and express my appreciation, to Cynthia Cannady who, in her work on this project, has done more than prove the thesis. I express appreciation also to Russell R. Wheeler, who, as a political scientist, has assisted immeasurably in stimulating my ideas, commenting on my early drafts, and obtaining data and copies of articles that would not otherwise have been available to me. The ideas in this paper have been gleaned from nine years on the bench, and consumption of a variety of literature from whodunits to criminology. If I footnoted every idea to give due credit to the source, there would be naught but notes, and research would take a year. In instances where I have purloined someone's reflections without giving proper credit, I apologize. Somewhere or other in this article, I have cited all of the major works that I have consulted recently. Every one of these authors has contributed more to my own thoughts than the citation can properly credit. At least six national commissions have studied and reported on some or all of the matters considered in this paper: Report of the National Commission on Law Enforcement (the Wickersham Commission) (1930); The National Crime Commission; the National Commission on Civil Disorders; the National Commission on Causes and Prevention of Violence; the A.B.A. Project for National Standards for the Administration of Criminal Justice; and the National Advisory Commission on Criminal Justice Standards and Goals.

2 Ezekiel, 7:23.

3 Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice.” 35 F.R.D. 273.

4 Pound realized as he said in 1900, “[o]ur criminal law is a growing cause of popular discontent with the legal system.” “Do We Need a Philosophy of Law?” 5 Col.L.Rev. 339 at 347 (1905). Pound was attentive to those aspects of the criminal justice system that appeared to his generation to be most in need of reform. He was active in the parole and probation movements, served on the Wickersham Commission, and broke new ground in empirical research on criminal justice in the study he and Felix Frankfurter co-edited, Criminal Justice in Cleveland (1922). Over forty years ago, there was a considerable literature evidencing concern with the administration of justice. See, e.g., A. Kuhlman, Guide to Material on Crime and Criminal Justice (1929); R. Pound, Criminal Justice in America (1930); and R. Moley, Our Criminal Courts (1930), and Tribunes of the People (1932).

5 See J. Riis, How the Other Half Lives (1890).

6 The President's crime message to Congress, June 19, 1975.

7 There is every reason to believe that trials today are fairer than ever before in history; the judicial process has been elevated in many regards. Much of the criticism directed at it stems from the fact that our ideals are higher, too. See Feeley, The Effects of Heavy Caseloads, a paper prepared for delivery at the 1975 Annual Meeting of the American Political Science Association, page 33.

8 Casper, American Criminal Justice, The Defendant's Perspective, pp. 135-6, 1972.

9 Burger, Annual Report on the State of the Judiciary (1976).

10 The federal, state, and local laws of the United States have created about 2800 criminal offenses. See The Challenge of Crime in a Free Society, The President's Commission on Law Enforcement and The Admin. of Justice 18 (1967).

11 I remind you that to decriminalize an act does not mean to condone it: to eliminate criminal statutes against nonviolent drunkenness on the public streets means only that we consider that there is a better way to deal with alcoholics than to invoke the criminal law. For an interesting view on decriminalization, see generally, Aaronson, Hoff, Jaszi, Kittrie, Saari, "The New Justice Alternatives to Conventional Criminal Adjudication," a paper prepared for the Institute for Advanced Studies in Justice, American University Law School, Dec. 1975.

12 As an example, consider sexual relations among consenting adults: we might inquire whether this is a proper concern of the law since it is evident that the law has never been effective in dealing with it. We should also consider public drunkenness.

13 U.S. Department of Justice Law Enforcement Assistance Administration National Criminal Justice Information and Statistics Service, Criminal Victimization Surveys in the Nation's Five Largest Cities 27 (1975).

14 FBI Uniform Crime Reports, 1974.

15 The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice 247 (1967).

16 In 1974, 1,916,685 crimes were reported and 371,494 arrests were made. FBI Uniform Crime Reports, 1974, Table 24, "Offenses Known, Cleared, Persons Arrested, Charged, and Disposed of in 1974."

17 McIntyre, "Prosecutors and Early Dispositions of Felony Cases," American Bar Association Journal 1156-7 (1970). This statistic was drawn from a study of six jurisdictions. The study found that the percentage of those arrested who were charged varied greatly from one jurisdiction to another. However, other sources differ so considerably-The FBI Uniform Crime Reports for 1974 show that 90% of those arrested arc charged-that doubt is cast on the meaningfulness of these figures.

18 The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice 262-63 (1967).

19 Zimring and Hawkins, *Deterrence*, University of Chicago Press, Chicago, 336 (1973).

20 One of the objectives of the criminal law system is deterrence. We speak of general deterrence, the idea that people will refrain from conduct if they expect to be punished for it. The companion concept is specific deterrence, that a burnt child fears the fire and the defendant once convicted and punished will sin no more.

21 American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pre-Trial Release. Standard 1.2C states: "Money bail. Reliance on money bail should be reduced to minimal proportions. It should be required only in cases in which no other condition will reasonably insure the defendant's appearance." The National Advisory Commission Report, see n. 1 supra, has taken a similar position, see Standard 4.6.

22 Proposals for fair pre-trial release have been numerous. One proposal would allow a defendant to deposit a sum of money equal to the amount usually paid to a professional bondsman.

23 This is the practice of all of the judges of the court of which I am a member, The United States District Court for the Eastern District of Louisiana.

24 See A.B.A. Standard on Pleas of Guilty, Section 1.5; Standard 3.7 of the National Advisory Commission Report and Rule 11 of the Federal Rules of Criminal Procedure.

25 See Commentary to Standard 2.1, National Advisory Commission Report.

26 Feeley, The Effects of Heavy Caseloads, a provocative paper prepared for delivery at the 1975 Annual Meeting of the American Political Science Association. The author concludes that heavy caseloads cannot be demonstrated to be the cause of the major problems of lower state criminal courts, after comparing the performance of a high volume, heavy caseload court with what

is done, no better, in a neighboring low volume, lighter caseload court. There is similar reason to suspect that heavy caseloads may be an excuse for plea bargaining rather than its cause.

27 In 1970 there was 1 lawyer for every 572 Americans, a considerable increase since 1951 when there was only 1 lawyer for every 700 Americans. The ratio is certain to have become larger since the absolute number of lawyers in the U.S. has increased dramatically in the last five years: In 1970 there were 355,000 lawyers, in 1975 the number climbed to 420,000. Statistical Report of the American Bar Association. See also, Johnstone and Hobson, *Lawyers and Their Work* (1967).

28 "Any agreement between prosecution and defense to drop a more serious charge in exchange for an undertaking to plead guilty to a lesser charge so familiar in some jurisdictions, is unheard of in both continental Europe and England. It would not only be unethical but in direct breach of the law and would expose all parties to prosecution." Glos, 3 St. Mary's Law Journal 177 at 203 (1971). See also Jescheck, The Discretionary Power of the Prosecution's Attorney in West Germany, 18 Am.J.Comp.L. 508, 509 (1970).

29 Some legal systems appear to require a trial in every case. See "Crime, Punishment in Russia," Washington Post, March 14, 1976. However, it appears likely that, when the defendant concedes his guilt, the trial is little more than a formality.

30 See Campbell, "Proposals for Improvements in the Administration of Criminal Justice," Chicago Bar Record 79, November 1972: "My own experience has established that liberal discovery will produce additional stipulations which in turn will avoid many trial hours, reduce the number of trial issues, avoid trial surprise and its consequential time consumption, and most probably result in increased, and obviously more intelligent guilty pleas." There is good reason to believe that omnibus procedure, because it allows defendants more information about the case against them, will lead to increased guilty pleas, thereby saving judicial resources. See Clark, The Omnibus Hearings in State and Federal Courts, 59 Cornell Law Review 761, at 765 (1974). Omnibus procedures might, among other devices, mitigate resources problems created by the abolition of plea bargaining.

31 A.B.A. project, cited note 24, supra; Standards Relating to Discovery and Procedure Before Trial § 1.5; National Advisory Commission Project, cited note 27, supra, Standard 4.9.

32 "Each participant involved in the criminal proceeding is assisted by the discovery process provided by omnibus. It has generally been recognized that pursuant to the open discovery procedure the defendant discloses those matters that he intended to reveal during trial." These matters may include alibis and witness lists. Myers, "The Omnibus Proceeding: Clarification of Discovery in the Federal Courts and Other Benefits," 6 St. Mary's Law Journal 386, at 397-8 (1974).

33 See *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). See Nakell, Criminal Discovery for the Defense and Prosecution-The Developing Constitutional Considerations, 50 N.C.L.Rev. 437 (1972).

34 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

35 See, e.g. the study of an unsuccessful omnibus procedure set up in the Southern District of California. Weniger, Criminal Discovery and Omnibus Procedure in the Federal Courts: A Defense View, 49 So.Calif.Law Rev. (1976).

36 The A.B.A. standards might suggest that omnibus may be an encumbrance in the case of minor offenses. Even in such cases, however, informal omnibus should be available.

37 The idea and the terminology are pervasive. See, for example, Aaronson, Hoff, Jaszin, Kittrie, and Saari, The New Justice-Alternatives to Conventional Criminal Adjudication vii (1975).

38 Delay. There is considerable evidence that delay results from the voluntaristic behavior of court participants. See D. Oaks and W. Lehman, A Criminal Justice System and the Indigent (1968); Banfield and Anderson, Continuance in the Cook County Criminal Courts, 35 U.Chi.L.Rev. 259 (1968); Levin, Delay in Five Criminal Courts, Ford J. Legal Studies 83 (1975). Neubauer and Cole, in A Political Critique of the Court Recommendations of the National Advisory Commission on Criminal Justice Standards and Goals, 24 Emory L.J. 1009 (1975), observe:

> "Delay is tied not as much to caseload pressure as to the goals of the participants in the decisional process. Defense attorneys seek continuance to avoid hard judges, maximize their own goals (for example, fee collection and limiting court time) and to mollify clients. *** The prosecutor may use delay to increase the stakes of

plea bargaining. Generally, judges acquiesce in continuances to pursue their own goals. Delay is not simply a question of managing the court docket more efficiently and providing more resources."

39 Feeley, op. cit. supra, note 29 at p. 35 et seq.: "Stated more bluntly, regardless of caseload, there will always be *too many cases* for many of the participants in the system since most of them have a strong interest in being some place other than in court."

40 Id. at 34. The author refers to Peter Drucker's Study, Managing the Public Service Institution, 33 The Public Interest 43-60 (1923). Drucker points out that public services institutions universally blame these factors for their own poor performance. He finds their importance almost always overassessed.

41 18 U.S.C. §§ 3161 et seq.

42 In 1970 38% of all civil terminations were achieved by contested judgment, an increase of over 100% since 1970, when the figure was 18%. Goldman, Federal District Courts and the Appellate Crisis, 57 Judicature 211 at 213 (1973).

43 Id. at p. 211. In 1970 the rate of appeal was 54%. Id.

44 Id.

45 For useful overview of the A.B.A. standards see 12 American Criminal Law Review Vol. 2, Symposium (1974). For a comparison of the A.B.A. and the N.A.C. standards see Edwards, "The A.B.A. Standards for Criminal Justice and the NAC Standards and Goals: A Comparative Analysis," id. at p. 363.

46 The term is frequently thought to mean "to speak the truth." But authority assures us that it originally meant "to see and to hear."

47 See Ziesel and Diamond, The Jury Selection in the Mitchell-Stans Conspiracy Trial, 1976 *American Bar Foundation Research Journal* 151.

48 Frankel, "Softheaded Judges," New York Times Magazine, May 13, 1973.

49 Levi, Address Before the Governor's Conference on Employment and the Prevention of Crime, quoted in 18 Crim.L.Reporter 2442, Feb. 18, 1976.

50 Sentencing practices have been criticized by numerous commentators. Much of the criticism has been directed at the arbitrariness and variability of sentencing. Senator Edward Kennedy called sentencing disparity a "national scandal" traceable "directly to the unbridled unreviewable discretion we give our federal judges in imposing sentences." "Making Time Fit the Crime," 12 Trial Magazine 14, March 1976, p. 29. A study recently conducted by the U.S. Court of Appeals for the Second Circuit, discussed in Dershowitz, "Let the Punishment Fit the Crime," New York Times Magazine, Dec. 28, 1975, illustrates the lack of uniformity in sentencing. In cases involving middle-aged union officials convicted on several counts of extortionate credit transactions, one judge imposed a sentence of 20 years' imprisonment plus a $65,000 fine, whereas another judge imposed a 3-year sentence with no fine. In cases of possession of barbiturates with intent to distribute, one judge gave the defendant five years in prison, while another put him on probation.

51 See papers prepared by UN Secretariat for the Fifth United Nations Conference on Prevention of Crime and Treatment of Offenders, Sept. 1975. For an outdated, but interesting study, see also, Mannheim, Comparative Sentencing Practice, 23 Law and Contemp.Prob. 557 (1958).

52 A large part of the criticism of sentencing stems from the sense of many observers that it is a capricious act, inspired by the discretion of a single judge in a particular case. The value of requiring reasons at the time of sentencing is that it preserves "the appearance of justice," as well as inviting the judge to scrutinize his own sentencing decision.

53 "No principled jurisprudence of sentencing will emerge before legislatures bring order to the penal provisions in their statute books or before judges routinely give reasons for the sentences they impose. Only in this manner can the broad and detailed sweep of a common law of sentencing evolve." Morris, The Justification of Imprisonment 80.

54 The President's proposal to fix mandatory minimum sentencing and to establish sentencing commissions is discussed in 18 Cr.L. Reporter 2425 at 2442, Feb. 18, 1976.

55 Id.

56 Appellate review of sentences has been advocated by the A.B.A. Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences.

57 Frankel, supra n. 48.

58 On Jan. 1, 1976, there were 300,000 prisoners in the U.S. confined to jail under sentence or awaiting trial. A greater proportion of our population is confined to jail than in any other nation for which reliable data are available. In addition 1.8 million Americans were under some form of parole or probation. Annex II, "Census of Prison Population in Certain Member States as of 1 Dec. 1972 and 1 January 1974", paper prepared by UN Secretariat for the Fifth United Nations Congress on Prevention of Crime and Treatment of Offenders.

59 In 1974 there were 8.1 million students in colleges in the United States.

60 The Bureau of Prisons calculates the average cost per year per inmate as $7,355.12. State costs vary greatly and may be shockingly high: In Oregon the average juvenile corrections cost per year per individual is $13,488.00. Clearinghouse for Criminal Justice Planning and Architecture, Juveniles, Cost Analysis Survey, University of Illinois at Urbana-Champaign, Feb. 27, 1975.

61 "The earlier a juvenile is arrested and brought, to court for an offense, the more likely he is to carry on criminal activity into adult life *** the more serious the first offense for which a juvenile is arrested, the more likely he is to continue to commit serious crimes *** and the more frequently and extensively a juvenile is processed by the police, court and correctional system the more likely he is to be arrested, charged and convicted and imprisoned as an adult." FBI Uniform Crime Reports, 1974.

62 National Advisory Commission, supra, n. 1, Standards on Corrections 603.

63 See Goldfarb, Jails 416 (1975). See generally National Advisory Commission, supra, n. 1, Standards on Corrections.

64 Federal Judicial Center Study, 1970.

65 1975 Annual Report of the Director of the Administrative Office of the United States Courts.

66 See Hopkins, Federal Habeas Corpus, Easing the Tension Between State and Federal Courts, 44 St. John's L.Rev. 660 (1970).

67 28 U.S.C. § 2254. See *West v. State of Louisiana*, C.A. No. 71-2312, E.D.La., Dec. 17, 1971, aff'd 5th Cir.1973, 478 F.2d 1026, vacated in part, 5th Cir.1975, 510 F.2d 363 (en banc). Note, The Development of the Plenary Hearing Requirement in Federal Habeas Corpus for State Prisoners, 32 Brooklyn L.Rev. 247 (1968).

68 See text at note 34 et seq., supra.

69 A.B.A. Project on Standards of Criminal Justice, Standards Relating to Post-Conviction Remedies § 1.1 (1968); National Advisory Commission on Criminal Justice Standards and Goals, Standard 6.1 (1973).

70 National Advisory Commission on Criminal Justice and Goals, Standard 6.2 (1973).

COMPLEX CIVIL LITIGATION-HAVE GOOD INTENTIONS GONE AWRY? [a5]

by Francis R. Kirkham

Of the San Francisco Bar

The Chief Justice has admonished us that the purpose of this Conference is not to consider specific and immediate problems but rather to direct our thoughts to an overall appraisal of the ***200** nature and utility of our judicial system.

Our effort should be to determine whether we need basic changes in the way we solve our disputes-changes which may not necessarily come today, but which will serve as goals toward which we should strive.

My role in this panorama is to discuss complex civil litigation.

When one views the problems of complex litigation and their manifest burdens upon the courts and parties-with an open invitation to look as far into the future as need be-the initial temptation is to speculate whether society might not be served just as well if large areas of these controversies were removed from the courts. Judge Rifkind's thoughtful paper suggests possibilities in other fields: probate, divorce, personal injury and others. In some areas, where simple cases have merely been aggregated into complexity-as, perhaps, in food product liability cases-this may be a distinct possibility.

But the most troublesome complex cases are in the fields of antitrust and civil rights. The essential role of the court in civil rights cases speaks for itself, and was brilliantly expounded by Jugde Higginbotham yesterday.

Suggestions have been made, however, that the antitrust laws might better be understood and enforced by a commission of experts.

Few other changes, it is true, would have a more beneficial effect upon the dockets of courts. But what of the fitness of such a judicial abdication?

Trustbusting in the American style is a phenomenon of no other judicial system in the world, as far as I am aware. But with all its travails, it has worked for nearly a century, with malfunctions that heretofore have not exceeded the tolerable. As in few other fields, the antitrust law is judge-made-this of necessity, since the sanctions of its basic statute are in terms as broad as those usually reserved for Constitutional provisions. Viewed from this perspective, the judges-the law makers-*are* its experts.

Perhaps the analogy lies deeper than appears at first glance. None of us would feel secure with a commission of experts, or even a legislature, interpreting and applying the due process clause. And while it is placing "unreasonable restraint of trade" in august company to compare it with due process of law, nevertheless from the perspective of remedies, and even from the standpoint of the interests involved, the comparison may not be too far fetched. A suit to restructure an industry is not ***201** an ordinary lawsuit against a few entities with fictitious names. It is a suit affecting millions of stockholders, hundreds of thousands of employees, pension and trust funds, banks and lending institutions, whole communities-indeed, the economy of the nation itself, with ripples throughout the world. The thoughtful restraints which characterize the exercise of the independent judicial function, rather than the surgical ruthlessness-even the fondness for the knife-that might characterize an office as volatile as each current mood, are as needed and fitting here as in the interpretation of Constitutional principles.

In each area, it is hard to unring a bell.

But the courts, trusted-and properly trusted-with the declaration of substantive law in respect of these issues of great consequence, have a correlative duty to fashion their processes in such a manner as to avoid oppression and to provide a forum in which a fair, prompt and reasonable determination of these issues can be accomplished.

What the year 2000 should see in that regard is my duty to forecast.

The year 2000 has an intriguing sound. 2000 A.D.! What will we be doing then?

What were we doing when we filed that lawsuit or decided that case in 1952?

Time has a way of opening up broad vistas when we look ahead, but compressing to moments as we glance behind. Each is illusion. But from it we can learn that it is not too unrealistic to look at tomorrow's problems in the light of those of today, and, certainly this is so, if today's problems are not solved.

I do not suggest that our effort on this occasion is couched in too ambitious an atmosphere. Not at all! But to return to my specific subject of complex civil litigation, I do suggest that the solution of what appear to me to be the most serious problems we face today will determine our tomorrows.

And so I have appended to these remarks a paper, quite inadequately prepared in the limited time we have had available before this meeting, treating in more detail some of the serious problems I find in the field of complex civil litigation. My paper will serve as an annotation to the thoughts I shall attempt to express here, and will give you an overlook of the roots from which these problems spring. [a6]

I have also supplied for your inspection a number of copies of a set of interrogatories in a recently filed antitrust suit. I invite ***202** your attention to it. It will serve as an Exhibit to my comments on the scope of discovery.

The road to our difficulties in complex civil litigation has been paved with good intentions. The strictures and traps of common law pleadings were replaced by a simple notice of the plaintiff's claim. Discovery was instituted to effectuate the Supreme Court's *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, teaching that "Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation." And the class action was expanded from its venerable roles in equity to provide a remedy for the small consumer against the predatory conduct of the mighty.

Each of these reforms was needed and worthy. But somehow we have permitted them to combine in the complicated case into a wave of abuse that threatens to undercut not only the principles of our profession but the judicial process itself.

Professor Harry W. Jones has reminded us that

> "Physicists and biochemists often say that scientific knowledge gains fully as much from experiments that invalidate research hypotheses as from experiments that verify them. Perhaps the same is true of law's experiments in the control of social behavior." [1]

When notice pleading dumps into the lap of a court an enormous controversy without the slightest guide to what the court is asked to decide; when discovery-totally unlimited because no issue is framed-mulls over millions of papers, translates them to microfilm and feeds them into computers to find out if they can be shuffled into any relevance; when the consumer class action fails in any meaningful way to remedy a hiatus in the consumer's needs and turns instead into an instrument to extort vast penalties from American businessmen for the principal benefit of lawyers, we should, I think, consider whether noble experiments have gone awry.

Professor Rosenberg was right when he said that "the road to court-made justice is paved with good procedures," and that

> "The growing menace today is the unrestrained tendency to take into courts the most explosive issues in the society-and to present them with explosive forms of advocacy." [2]

***203** The typical complaint in a large antitrust suit today says little more than that defendants have conspired to restrain trade. Explosive advocacy immediately takes over and discovery knows no bounds. The Judicial Panel for Multidistrict

Litigation recently refused to consolidate a case with the *IBM-Control Data* litigation, in part because of its belief that in that case "hundreds of millions of documents will be produced." In another case, 1,265 depositions, totalling 144,000 transcript pages, waited the *commencement* of trial. You will recall and contrast the plaintiff complaint of the Supreme Court in the landmark *Standard Oil* case in 1910 that "The record is inordinately voluminous, consisting of twenty-three volumes ***, aggregating about twelve thousand pages."

Common sense requires the suggestion that the gathering and perusal of one hundred million documents is beyond the scope of reasonable discovery. Even more, it makes one question how masses of data of this magnitude can possibly be assimilated and welded into an informed decision.

Nevertheless, ingenious counsel, building on the ingenuity of those who filed the last paper, much as the old insurance contract grew from decision to decision in fine print, continue to expand the scope and complexity of each demand until a monster like the interrogatories I have submitted for your consideration here today is produced. Those interrogatories-which, you will bear in mind, represent only the first preliminary wave of discovery-call, among other things, for a description of hundreds of millions of documents in the files of hundreds of companies in this country and in foreign countries on every inhabited Continent of the Globe.

Judges throw up their hands and ask how they can examine a million documents and say whether they are relevant, and the problem is all too often solved by simply giving plaintiffs access to all of defendant's files and records, relevant and irrelevant.

And thus the second evil emerges-a massive and unequalled invasion of privacy and business records.

To put it bluntly, the courts and the profession have slept while the processes we employ to achieve substantive determinations have swallowed up the capacity to make such determinations.

The problem has grown to a point where the burden upon courts and parties is secondary.

The real concern is retaining the capacity to achieve justice by rational means.

***204** In the meantime, with great remuneration to my profession, but with a sad impact upon the public, litigation is the new growth industry, adding billions of dollars to the cost of producing consumer goods and services.

What is the basic trouble? The basic trouble is illustrated by the complaint on which these interrogatories are based. That complaint alleges-and I am not summarizing, I am quoting almost verbatim-that defendants combined and conspired to monopolize and restrain interstate trade and commerce. It is as though I were to file a suit: "Comes now the plaintiff and alleges that the defendants were negligent; wherefore plaintiff prays damages," and then filed interrogatories inquiring into every act of defendant in all of its operations, everywhere.

A plaintiff who invokes the processes of a court knows, or should know, how and by what he has been injured. In the complex case, as in every other, he must be required to state this and to formulate triable issues before general discovery is instituted. Discovery was instituted to uncover facts relevant to a cause of action. It was never intended to be perverted into an instrument for fumbling about in an effort to discover a cause of action.

A further illogical contributor to the scope and complexity of antitrust cases-which has added immeasurable costs and immeasurable burdens-is the improvident construction of the statute of limitations in conspiracy cases-a classic example of the failure of courts fairly to conform their processes to the needs and essential fairness of the trial of complex cases. By permitting fraudulent concealment to toll the statute in these cases-quite illogically, since conspiracies by their very nature are self-concealing-the courts have extended the scope of discovery and the possible scope of trial to any period

the plaintiff wishes to name-10, 20, 30 years-dredging up transactions so remote that different principles of law might then have been applicable, and the memories of most of those who participated, if they are still alive, are faded or gone.

Contrary to what might be the first reaction of casual observers, it is the civil case that is building up the backlog in the dockets of our courts. Whether this results from the disposition of criminal cases while civil cases go unattended, the fact remains that during the past five years pending criminal cases increased hardly at all in the Federal courts while pending civil cases increased by more than 25,000. Among these, the complex civil ***205** case increased at the highest rate, and of these, class actions are reaching flood stage.

Let us consider these actions for a moment.

Nearly five thousand class actions are now pending in the Federal courts, and in the state courts the gates are just beginning to open wide. Of these, the most significant are the so-called consumer class actions.

Actions of this type were unknown until the amendments to the Rules of Civil Procedure in 1966, counterparts of which have now been adopted by many states. They are a totally new phenomenon in the law, incredible in their scope and consequences.

For example, a plaintiff brings an action charging that the price of a commodity was increased by a conspiracy. He brings the action on behalf of himself and of every other person who bought the same product-sometimes every person in the same state, sometimes in a section of the country, sometimes in the entire country and even foreign nations. Hundreds of thousands, millions of persons are aggregated into these classes. Often, if not typically, the claim of each person in the class is small, if not trivial. In the well known *Eisen* case, plaintiff's claim was for $70; the claims of the 6,000,000 class members he purported to represent averaged between $3.64 and $10 each.

One wonders when the court entertained the action, what it thought of the principle, so ancient that every first year law student can phrase it in Latin, that the law does not concern itself with trifles.

But in the aggregate the claims amount to millions, and even billions, of dollars. In the *Montgomery Ward* case, the potential judgment was more than eight *billion* dollars-ten times the defendant's net worth and 230 times its annual net income.

Once the first class action is filed, others immediately spring up, as lawyers begin to think up new classes and jockey for position in the final race for fees, or, in case of states, for the escheat of large unclaimed recoveries.

Pretrial hearings are moved into large courtrooms to accommodate the growing ranks of lawyers, each seeking to have his client designated as a class representative. In the background, bargaining goes on for the merger of classes in such a way as to protect the fees of plaintiffs' attorneys.

Gamesmanship is rampant. As good an example as any is the attorney general of one of the most populous states of the Union who named as his class all citizens of his state who had purchased ***206** the ordinary household product involved. When confronted with the *Eisen* requirement that individual notice must be given to class members who can be identified, and with the fact that millions of his fellow citizens can be identified from assessment rolls and voting records, he amended his complaint to name every “household unit” in the state as his class members-members, he then solemnly assured the court, he could not identify and could, therefore, make parties by publication.

Typically, the hundreds of thousands or millions who are named in these cases have never had an interest in enforcing any claim, disregard or are baffled by notices that purport to make them members of the class-if any notice ever is received-

and in most cases even fail to respond when settlements on their behalf have been made and monies are available for distribution.

Nothing can disclose the true situation better than a single example.

Not long ago I received a check for $1.78 and learned for the first time that I was a member of a large class on whose behalf a suit had been filed to recover overcharges on telephone calls made at hotels. Apparently the Waldorf Astoria, along with other defendants, had settled the claims. It had been years since I had stayed at the Waldorf but my just claims had been ferreted out and a judgment on my behalf obtained by a lawyer who undoubtedly received several hundred thousand times the amount of my judgment. The ultimate irony was that I had no cause of action. I was not the person injured, if in fact there ever was an illegal overcharge. I had passed the charge on to my client. I couldn't remember offhand who that client was, and so, unlike the court that entered the judgment, I refused to concern myself with trifles and put the check in the messengers' Christmas box.

This is not a humorous anecdote; it is a tragic anecdote-the administration of justice reduced to a farce.

As far as these actions are concerned it is time, I suggest, that we take a look at the Emperor's new clothes.

Have these actions fulfilled the hope that they would serve as a bona fide means of reimbursing small consumers? Have the courts so shaped their processes as to achieve a just resolution of the merits of the claims? What social purpose is served by going through the fiction of making millions of uninterested persons parties to a suit in a court of justice, aggregating all of their trivial claims into enormous sums so crushing on the defendants as to induce huge settlements to avoid destruction, ***207** and then paying these sums only in small part to the consumers, who may or may not have been injured, with the balance going in exorbitant attorney's fees and to the state, or to some public purpose designated by a benevolent judge?

The answer usually given is, not that such judgments are necessary to compensate injured consumers-all consumers with a worthwhile interest are free to join in a single suit or in a suit already pending in which costs and attorney's fees will be allowed-but rather that they serve to deter violations of the antitrust and securities laws, and like statutes, and to compel defendants to disgorge ill-gotten gains. These reasons, of course, simply expose the hypocrisy of masquerading what in fact is a criminal proceeding with extravagant penalties in the clothes of a civil suit.

Paradoxically, small companies are the most seriously threatened as they find themselves swept into the vortex of a vast industry case. The costs of defending such suits are totally beyond their experience. As alleged co-conspirators they must be told by their counsel that they are jointly and severally liable for total damages. No matter how sincere is their belief in the innocence of their acts, they have little practical alternative but to settle, and certainly no alternative but to join in any settlement by the larger companies or be left with a potential liability measured by the total damages a jury might find, trebled, less only the settlement amounts.

In the nearly half century of my practice I have never seen a single other circumstance which has created the cynicism at the bar that has arisen from the settlement negotiations in these cases and the accompanying maneuvering for fees. Nor have I ever seen before anything to equal the consternation of unbelieving businessmen, large and small, when told that the law literally does not provide them with a process for determining the merits of their defense; that any settlement within their purse, as a practical matter, may be their only chance for survival.

It is not the finest hour of a profession that produced a Lord Coke to challenge the Crown, and a David Dudley Field to challenge the right even of a Lincoln to suspend the writ of *habeas corpus*.

Let me turn to a final topic which at first glance-but at first glance only-may seem to shake old foundations-the use of juries in complex civil litigation.

***208** And since one picture is sometimes better than a thousand words, let me give you this picture:

Recently an antitrust suit charged conspiracy by three large grocery chains. The attorneys discussed the case, defendants' attorneys pointing out why they felt the suit was without merit. After what must be assumed was a fair appraisal of his case by plaintiffs' attorney, the largest of three defendants settled for less than $40,000, another for less than $50,000-each a typical nuisance settlement, as anyone familiar with antitrust litigation will recognize. The third defendant had the opportunity to make even a smaller settlement, but convinced of its innocence and unwilling to pay Danegeld, went to trial. The jury returned a verdict against it, trebled, of $30 million dollars!

It is difficult to imagine a less appropriate mechanism for the determination of facts in a protracted and complicated suit than the civil jury. Because of the quantitative scale of most antitrust, securities and class action cases, and because the intellectual effort called for defies comprehension by a jury wholly inexperienced in the resolution of such matters, a jury is simply unqualified to participate in such cases. Sitting for months on end in a complicated civil case, a jury, no matter how well directed by instructions from the court, cannot be expected to sustain the interest or attention necessary even to collate the evidence, let alone to understand it. The problem is compounded because many courts, recognizing that jury service in these cases is a severe imposition on the private lives of individuals, excuse from jury service many persons best fitted by training and experience to decide cases involving business and economic relationships.

Further, the whole process of the trial of a complex case, efficiently pursued, is foreign to the mode of jury trial. Different issues may best be tried separately. Recesses for supplemental briefing and argument to put to rest past issues and shape future courses may be helpful.

Due process of law entails a process under which litigated matters will be decided by an arbiter within whose competence they lie. If, in the course of events, a traditional mode of trial makes it impossible for a case to be comprehended and the law understandingly applied, due process requires that that mode be replaced. To afford merely the opportunity to present evidence and argument in a forum unable to comprehend them is simply a mockery of justice.

***209** While the civil jury is enshrined with constitutional status in this country, the United States is the only major industrial country in the world which has preserved jury trial in civil cases. Juries are unknown in the European civil code countries, and in England, where the jury system originated and to whose great history we turn for a definition of our fundamental rights, trial by jury is discretionary with the judge in all but a few types of civil cases, such as libel and slander. It can hardly be concluded, therefore, that the civil jury is an indispensable element in a fair judicial system. Nor can it reasonably be supposed that the founding fathers, when they “preserved” the right to trial by jury in “Suits at common law, where the value shall exceed twenty dollars,” intended to mandate a jury in a modern antitrust or securities case, extending over months of trial, with complicated issues totally beyond the jury's comprehension.

The most recent views of the Supreme Court recognize this and hold that a case beyond the “practical abilities and limitations of juries” is a case which falls outside the scope of the Seventh Amendment, just as at common law complex issues of accounting were triable without a jury.

I referred earlier to a judicial road paved with good intentions. But I must do more than just describe the downward course of that kind of road.

I suggest one specific change:

Courts should exercise their traditional equity power, unaffected by the Seventh Amendment, to dispense, in their discretion, with juries in complex cases. If statutory impediments exist, they should be removed. Since this will deprive the parties of the right to demand a jury before a judge in whom they may not have confidence, essential fairness would seem to require that each side should have one challenge without cause-a proceeding followed in many state courts.

Beyond this, I put to you these questions for your consideration:

Can courts afford to permit private suits to be expanded into inquiries into the vast business operations of an industry and to every transaction of a generation before the plaintiff decides what claim he will put before the court to adjudicate?

The judicial system can tolerate an occasional massive suit to restructure industries or to reach universal abuses-but only at the suit of the Government, with its capacity for pre-court ***210** factual investigation and after appropriate policy decisions of the magnitude required. The role of a private plaintiff is entirely different. He has a cause of action for a discrete violation which has inflicted a discrete injury. Before he invokes the judicial process he must be able to identify that violation and that injury-whether through his own investigation or through facts disclosed in a prior government proceeding, and discovery must be limited to that specific tort.

The great abuse of discovery has come from confusing the roles of public attorney general and private attorney general and failing to confine the latter to relevant inquiry. We have turned discovery in a private suit into a combination of a Civil Investigative Demand and a grand jury-proceedings appropriate only for the Government, and antedating court proceedings.

Just to put the matter simply and concretely, any lawyer who has deposed a plaintiff in an effort to learn the grounds of his complaint in numerous complex antitrust cases has received the stock answer, “I don't know. You'll have to ask my attorney.” And the attorney says, “How can I answer without discovery.”

The cart is before the horse. If the order is not reversed, ought the journey be permitted to get under way?

It has taken us more than the 25 years which separate us from 2000 A.D. to build up a shibboleth that summary judgments are disfavored in this area. Yet, is it not true that just here is where summary procedures would seem most desirable in dealing with cases where partial limited discovery might expose lack of merit or a less ambitious cause of action? And is not this exactly where and when a capable and imaginative judge should exercise his supervision?

Are consumer class actions a prime example of procedures stifling substantive adjudication, and even, as a practical matter, foreclosing parties from the benefit of any substantive determination? Is the remedy distorted beyond reason and social value when the claims of millions of persons, suffering trivial damages, if any, are aggregated into vast sums inflicted as penalties and distributed in no realistically compensating fashion?

Is the judicial process itself abused when it is asked to enter *in personam* judgments binding upon hundreds of thousands or millions of persons, most of whom have never heard of the existence of the court or the suit? Can any rational judicial system hold out such judgments as *res adjudicata*, foreclosing claimants and protecting defendants against double liability?

***211** Is it not the injunction that is appropriate for this type of injury? And if further deterrent is needed, are not increased criminal sanctions the appropriate remedy? And if compensation and access to the courts are still considered essential to the most desirable remedy, is not some type of voluntary joinder the only remedy which can provide this and at the same time keep the remedy within reason and preserve the integrity of the judicial process?

I close with this warning-which only a practitioner can express as feelingly, for judges all too often shift to counsel as much as possible the burdens of a massive case-the Big Case literally threatens to engulf us. More than 25 years ago-once again less time than remains before our goal of 2000 A.D.-the Prettyman Report warned us. But even a quick look at the Manual for Complex Litigation, which is the fruit of that Report and which represents our best efforts up to now, leaves the chilling impression that its authors have resigned themselves to accepting these monstrosities and are merely doing their best to "gee" and "haw" them on their ponderous way.

I do not foresee that the administration of the substantive law in the antitrust, securities and civil rights fields will or should be removed from the courts. Let me repeat, therefore, for emphasis Professor Rosenberg's thought, "the road to court-made justice is paved with good procedures."

The responsibility rests directly and most heavily upon the judges. I would hope for 2000 A.D. a more careful appraisal and enforcement by them of the procedures that can pave the way to justice.

But the shaping of these must start today. Like Robert Frost's traveler, we are at the crossroads, we will not be back, and the road we take will make all the difference.

a5 The detailed material on which this paper is based will be published in the proceedings of the conference scheduled to appear as a separate volume later this year.

a6 See footnote p. 199.

1 H. Jones, The Efficacy of Law 13 (1968).

2 Maurice Rosenberg, "Devising Procedures That Are Civil to Promote Justice That Is Civilized," 69 Mich.L.Rev. 797.

*212 THE BUSINESS OF COURTS: A SUMMARY AND A SENSE OF PERSPECTIVE [a7]

by The Honorable Edward H. Levi

Attorney General of the United States

Mr. Chief Justice:

To summarize the views expressed on Topic One is to add my voice to what is now a thrice-told tale. The organizers of this conference have taken a leaf from the oldest truth in education, or perhaps their model is appellate review. Anyway they obviously believe in the value of repetition.

I will attempt to describe primary themes, to identify points in common and differences in emphasis and views. The topic itself suggests that courts, or some courts, may be engaged in the resolution of disputes they are not well equipped to resolve, or that other institutions could resolve these kinds of disputes more efficiently and effectively. But the immediate phenomenon of concern is that the number of suits submitted for judicial resolution has increased dramatically. In addition, it is said litigation has become increasingly complex. Taken together all panelists agreed that at some point the torrent and complexity of litigation may prevent courts from devoting to those matters, as to which their exercise of judgment is critical, the necessary attention and care. Indeed it is suggested that increasingly courts are finding it difficult to act in their best tradition. For example, they are not allowing oral argument; they are deciding frequently without opinions. I believe all would agree that the courts exemplify the reasoning tradition of the application of standards to particular situations and do this in a way, as the Solicitor General said, that there is an accountability which comes at least from explanation.

Because of the volume of suits and their complexity, delays in the administration of justice have occurred. Judge Rifkind said that for some plaintiffs in some kinds of cases, the delaying effect of litigation may be the primary, perhaps the sole, reason for ***213** filing suit-simply to delay and impose expense on the other party. As Judge Higginbotham emphasizes in his paper, delay in litigation adversely affects not only the litigants, but also others-witnesses and jurors-who become involved in the system. Delay may allow the commission of further crimes or illegal actions by the defendant. Another consequence of delay and of the expense of complex litigation, Professor Sander wrote, is that potential litigants may be driven to avoidance; that is, to withdraw from situations likely to create disputes that can be resolved only by resort to the courts. Such avoidance may entail heavy social or individual costs. Several speakers emphasized that costs and delays discourage potential plaintiffs from attempting to get redress for legal wrongs.

Contributing to the number and complexity of suits is the change in the use of the courts. It was suggested the traditional model of the judicial process-a dispute between two parties resolved through the adversary system with an allocation of the burden of proof and with the judgment directly affecting only the immediate parties-has, in substantial measure, collapsed. Courts now often are engaged, not in dispute resolution in this traditional sense, but in what Judge Rifkind termed "problem solving." This may be in part the result of the attempt to carry the burden of multiple litigation. Dean Griswold suggested the basically wise provisions for class actions may have been overextended. The tendency, perhaps the necessity, of dealing with disputes en masse and of providing mass remedies can profoundly affect the reality of the substantive law and its evolution. According to one account, this tendency has led, for example, to practical elimination of the reliance element in securities class actions; it has also led, I suggest, to the development of remedies like affirmative action in employment, imposed originally as an evidentiary device to compel compliance with anti-discrimination decrees, but now perhaps a measure of the substantive wrong itself.

The "problem solving" model of the judicial process was related not only to the mass-parties, mass-remedies phenomenon, but also to the kinds of issues courts are called on to resolve. Courts have become, Judge Rifkind said, "jacks of all trades," dealing with extended variants of what Professor Sander termed "polycentric problems," which can implicate wide-ranging social and economic interests not fully or, conceivably, at all represented by the adversaries in court.

Procedural and substantive changes may be essential if the courts are to be effective and efficient. But the question then is ***214** the cost of what has been given up and whether other remedies are available. This is of course true of all the remedies suggested.

The vast growth in the dimensions and subjects of governmental concerns is undoubtedly among the chief causes of the increase in the volume of judicial business. The expansion of governmental concern may be in part the product of the decline in private institutions-the church, the family, and the community were mentioned; one might add the schools-that once imparted values and so controlled conduct. One of the consequences of that decline may have been the increase in the rate of crime, a phenomenon which unquestionably has played a major part in the burden on the courts.

There has been an increasing turning to the courts by the legislature. Not only have new categories of legal obligations been confided to the courts for enforcement, but obligations come surrounded with legislative indefiniteness. The turning to the courts is evidenced in the legislative use of the courts as a means of monitoring the activities of the executive by insisting on judicial review, and through the device of private litigation against government, encouraged by both the courts and the legislature, to attempt to ensure conformity with a vague legislative will or to give new substance to individual rights.

Pound recognized the need for new governmental instrumentalities and social action in his remarks seventy years ago. Pound spoke, as Judge Higginbotham reminded, of the courts' posture, then, in thwarting legislative attempts to remedy social and economic injustice-a posture altered only through the long history of legislative effort and judicial reappraisal. All three panelists emphasized that the situation, whatever the dissatisfaction with the administration of justice may be, is

vastly different today; they differ somewhat in their appraisal of the present and indeed of the past. All would recognize, I suppose, that the courts today have not stayed legislative reform, at least in the areas of concern to Pound; they have not in the same sense created a void equivalent to a no-man's land for social regulation.

But new constitutional rights do ban certain kinds of legislative action; traditional and present doctrines do ban some legislatively attempted remedies. Referring to these rights and doctrines. Judge Higginbotham suggested that Pound, in important respects, overlooked injustices which should have been recognized as causes of dissatisfaction. Judge Higginbotham described, in particular, the legal development between Pound's time and our own in the fields of race relations and the rights ***215** of women and voters. His point was that the courts, in upholding or ratifying state actions and attitudes that denied fundamental rights, participated in creating the conditions that have since taken extended efforts, including those of the judiciary, to remedy. Several speakers emphasized the growth in the use of the courts as mediators between the government and individuals or groups, and observed that the courts now have moved to fill voids created by the default or failure of other governmental institutions-particularly the failure to respond to the demands of individual rights or to take positive steps to achieve social justice. At this point one must recognize that concepts are slippery-one agency's determinations may be viewed by another as defaults. The question cuts deep. It raises the issue of ultimate responsibility.

Another kind of legislative lapse was described-the failure to take steps to remove from the courts, through appropriate changes and simplification of the substantive law, categories of disputes where judicial resolution is now unnecessary to the public interest. It was suggested that there has been a comparable failure by the courts to take sufficient steps, when they can, to simplify procedures and also to establish clear substantive rules that, as Dean Griswold said, could be administered elsewhere, including in the lawyers' offices where understanding and explanation are essential to the system. Moreover, as Judge Rifkind said “when law is so unpredictable that it ceases to function as a guide to behavior, it is no longer law.” Lack of clarity in the scope and application of the law is one of the primary generators of disputes.

In short, the speakers described a spreading judicialization of relationships, the enlargement of the use of governmental power to control and channel private activity, the concomitant increase in the necessity of creating and enforcing limitations on that power, and the increased use of the courts as the instruments to those ends. We are in what Grant Gilmore has termed a “romantic period” of the law's development, a period of instability about its reach, content, and dimensions. Perhaps it is right to say that the expansion in the law and in use of the courts is a mark of judicial success and that dissatisfaction came not because judicial decision was too often invoked, but, because of delays and expense, it could not be invoked often enough.

Judges, particularly under the rule of constitutional judicial review and the American tradition, are, in a special sense, law makers. They always have been. Access to the courts, in comparison ***216** with so much of the rest of government, is relatively easy. The court can be the target or focus for action, and that they are. Lawyers often find that target a more attractive one than efforts to reach other law making bodies. The courts can be compelled or at least are willing to decide complex issues as a matter of law or right, in circumstances in which the legislature or executive has avoided or deferred decision, perhaps because the legislature or executive has determined that the data for decision are unavailable, or has decided governmental action should not reach that far.

At the same time the judicial remedy may raise expectations and generate dissatisfaction when the expectation is not fulfilled. Indeed dissatisfaction may result even when the expectation is fulfilled in this way. If we move from a consideration of the most effective administration of justice to an inquiry into the sources of dissatisfaction, then I think we have to admit we are in an area where the creation of some remedies, or the way they are created, may spread feelings of dissatisfaction. It is one thing to improve by legislation the social organization of the state; it is another thing to accomplish reform by a court-created constitutional condemnation of prior behavior as violative of the fundamental rights of man. This does not mean the condemnation has not been properly given. It does mean that a powerful weapon has to be used with care.

The conference, I believe, came quickly to a realization there was no one overall cure which should be used to answer the problem of the overcrowding of the courts, and the attendant issues of the costs of litigation, a possible decline in judicial standards, and thus a change in the quality of justice. As part of the answer, Judge Rifkind and Professor Sander focused on an analysis of the nature of the judicial process and an identification of its distinctive features. On the basis of this traditional model, it was suggested that the jurisdiction of courts be preserved for those disputes that they have historically handled best-the resolution of concrete disputes where the law is unclear. By contrast, where the task is largely ministerial or routine, involving the repetitive application of settled principle, then some other form of dispute resolution mechanism should be substituted. Through this allocation, the courts would retain their primary role as a formulator of positive law.

The second principle to guide reform was that courts should continue as the protector of basic constitutional or human rights. Judge Higginbotham and others placed primary emphasis on this point, noting that individual rights would go unprotected ***217** if courts were to be removed from this area. They called for an inquiry as to whether proposed reforms might work to the disadvantage of the poor, the weak, and the powerless. I think it is correct to say that other panelists, commentators, and small group spokesmen expressed agreement with the point. Although doubts were expressed about the competence, resources or remedial powers of courts to run mental hospitals, schools or welfare departments, there was consensus that courts cannot decline jurisdiction where serious denials of constitutional rights are at issue. The example repeatedly mentioned was Judge Johnson's order in the *Wyatt* case, D.C., 334 F.Supp. 1341, placing the mental health system of the State of Alabama under the supervision of the federal court.

There is tension among the criteria presented for judicial reform. There is doubt about the courts' competence or authority to become a problem-solver for society and a desire that courts confine themselves to their traditional role. At the same time, there is great reluctance to deny access to the courts, or to deny protection of rights when, as it is said, other institutions have defaulted. The tension is understandable. But the dilemma of what happens when the theory meets an actual situation seems to point to a defect in our governmental structure.

Several speakers addressed the most obvious solution to the problem of court overload-increasing the number of judges. An immediate need for additional judges was recognized. Professor Johnson described the relatively low investment in judicial resources in this country, compared to other industrialized societies. But the view was expressed that increasing the number of judges could not be a long-range solution to the problem. It is difficult to find a sufficient number of judges qualified by experience, intelligence, and judgment to perform the demanding task of a judge; increasing the number of judges will affect their prestige, making it more difficult to persuade outstanding lawyers to accept the great responsibility and lower salary of judicial office (even though the point was made, as I recall, that judges were paid more than some physicists). A decline in prestige of judges may also affect the respect in which their decisions are held by the general public.

An effort must be made to achieve greater clarity and simplification in the law. Judge Rifkind commented on the excessive complexity of laws relating to securities, antitrust, and taxation. Much could be done to reduce the caseloads of courts if legislation were more carefully drafted, or if the operation of legal rules were simplified. A more mechanical legal rule would ***218** also allow disputes to be resolved by a clerk or some other non-judicial mechanism.

Another approach would be to adopt new ways to deal with certain social problems to remove the need for judicial resolution. Several speakers advocated the no fault approach to personal injury claims, and suggested the extension of workmen's compensation laws to cover seamen and railroad workers. At times it was suggested that all negligence cases be removed from the court system, on the stated theory that an alternative was available and that accidents were a necessary risk of our society. Perhaps I may be permitted to remark it was this recognition of the risk as well as a belief in the effect of responsibility which created the law of negligence in the first place. Another possibility, mentioned by Judge Rifkind, is the British practice in handling corporate takeover disputes. The divorce laws, and the attendant

laws governing alimony and property settlement, were also identified as possible areas for simplification. Finally, there were areas that do not warrant governmental intervention at all. It was suggested that "decriminalization" should be considered for certain "victimless" crimes, such as drunkenness, prostitution, and gambling. It was questioned whether such behavior is still an appropriate subject for governmental regulation, or at least for regulation by the courts.

Procedural reforms were proposed, including the way the issues in a case might be sorted out and priority given. The increased use of alternate dispute-resolving mechanisms was emphasized. Mediation and conciliation were thought by Professor Sander to be especially appropriate for disputes that arise in long term relationships. He also suggested the use of ombudsmen. Special emphasis was given to arbitration-a form of adjudication, but more informal. Indeed, there was a suggestion that arbitration clauses in contracts be required. Screening devices were discussed as means to filter out frivolous cases or to encourage settlement at the start of the court process. Some of these devices involve the allocation of litigation costs. Judge Rifkind, for example, mentioned the English practice of imposing the expense of attorneys' fees on the losing party, but noted that our history is opposed to such a rule. Other devices involve the requirement of posting a bond for defendant's costs. Professor Sander described the Massachusetts system for medical malpractice cases under which a plaintiff, before being allowed to proceed further in the court process, must convince a three-man board, composed of a doctor, lawyer and trial judge, that his claim has "prima facie" merit or, failing that, post bond for the ***219** defendant's costs. Professor Sander also described the Michigan Mediation System, under which a panel of a judge and two lawyers determines damages in tort cases in which liability is acknowledged. If the plaintiff or defendant refuses to settle for that figure determined by the panel, he is taxed for costs and attorney's fees, unless the judgment is substantially more favorable to him than the panel's estimate. Judge Rifkind suggests that a civil litigant be required initially to show "probable merit" in his claim before the case proceeds to lengthy discovery and trial. He also mentioned the variety of gates, traditionally used, although perhaps somewhat battered, to exclude some would-be litigants from the courthouse.

It was recognized that these screening devices are in tension with the notion of free access by aggrieved citizens to the courts. Care must be taken to ensure that a screening device does not work to exclude individuals for adventitious reasons. The importance of judicial resolution, to society as well as the litigant, may have no relationship whatever to the size of the claim. Professor Sander added the further point: The creation of alternative dispute resolution mechanisms may result in an actual increase in the number of disputes to be resolved governmentally. The availability of these mechanisms, including those non-coercive in nature, may serve to "validate" claims. This may induce individuals to invoke the mechanisms even in cases where private negotiation and compromise would eventually have produced a resolution satisfactory to the parties. The very availability of alternate dispute resolution mechanisms may result in more disputes to be processed, if not by the courts, then at least by governmental institutions. I assume there may be responsibility, which ought to be thought about, for creating less, not more, disputes in our society. There is another side to this, but I do not think the question is an easy one.

Dealing with the particular problems of the federal judiciary, several speakers advocated elimination or reduction of diversity jurisdiction and use of three-judge courts. The Solicitor General proposed a novel system of special or administrative courts to deal with the large volume of repetitive cases that arise under certain federal legislation.

Several speakers agreed that a major part of the solution to the problem of court overload lies in encouraging the legislative and executive to remedy their defaults, which have led to judicial intervention, and to change the manner in which they respond to difficult social and economic problems. In Judge Rifkind's words, "the courts should not be the only place in which ***220** justice is administered." The difficulty, however, is that if the government is involved, as it has been in the recent past, then the courts are likely to be involved. Perhaps what is intended is an emphasis on those solutions which can be carried out ministerially, or on greater reliance on the private sector in response to new rules, or on statutory revision which itself clarifies existing legislation or does away with abuses.

From the description of the points made, the ideas advanced in yesterday's discussion, one point is evident. The discussion, like the topic, touched on an enormous range of phenomena. The phenomena and the problems undoubtedly vary, from the federal system to the states, and among the states. In the description of the problems, we may be giving, as Professor Nader suggested, only a soft look. The data are soft; we should look for better. As Professor Nader knows, however, it is not easy to get the data. The softness may extend to assumptions of judicial success, as well as failure, to public satisfaction as well as dissatisfaction.

Perhaps Dean Pound was right in his suggestion, seventy years ago, that the growth of government action was the inevitable consequence of an advanced and increasingly interdependent society, generating and accelerating the development of what Dean Pound termed "the collectivist spirit of the age." In many cases, the government has proved to be an instrument of progress, and its intervention has been necessary to the resolution of complex social and economic problems.

I think there would also be agreement, however, that not all aspects of modern society or individual action are best controlled by the government. Many of the great injustices in our history were caused or confirmed by governmental action. The assumption that government by its nature will inevitably be an instrument of good, or that its judgment will always be wise, is not the necessary product of experience. So, too, our history disproves the notion that private institutions cannot also be effective agents of progress and justice. That there are areas where progress is accomplished non-governmentally is a thought that comes easily, if I may be permitted to say this, to the former president of a private university. Diversity and creativity have at least an alternative home in the private sphere. When the President of Columbia University says to this group, not entirely in jest, that he has been sued frequently for doing his duty, he is making this point.

I believe we must recognize that courts can become, not agents of progress, but an obstruction to progress. Judicial entry into ***221** an area previously reserved to the legislature may displace the legislature as the primary formulator of social policy. Professor Nader's soft data point bears on the formation of rights and remedies. Change on many fronts must be tentative, experimental-qualities that can characterize legislative solutions. Constitutional rules move much more in the realm of the absolute. Moreover, the effect of judicial assumption of these responsibilities can be that the legislature and executive will refrain from serious discussion and decisive action with the risk-taking which responsibility imposes. Where the decisions are difficult, there is always the temptation to avoid confronting them, to let that responsibility pass to others. Even where there is the possibility for legislative and executive resolve, the "freezing effect" of the constitutional rule imposed by the courts may frustrate an effective response by these institutions.

Responsible democratic government has a duty to articulate our goals as a society, although certainly not all the goals for private individual or even for all collective action. In a special way, courts share in that governmental responsibility. The mission of courts involves not only the resolution of disputes but also the explication of the general principles that inform decision. Those principles are grounded in law, but their meaning is often an evolving one, influenced and shaped by the changing circumstances of their application. The nature of the judicial process requires that courts proceed with care, through articulated reason, in applying these general principles and rules. The process of change is slow, interstitial, in the fashion of an artist creating a great mosaic, as Judge Rifkind described it. These qualities are important, for they are the qualities of a reasoning society, which ours is supposed to be. To demonstrate and exemplify this is an important role for our courts. Change, of course, does not always come this way in the courts. Constitutional law, while it is a great common law, sometimes has more abrupt and decisive turns. Yet, an important reason for the respect in which courts are held is the perceived constancy of the principles which govern them and which they apply.

The present reality, as described by the panelists, is that the courts are now deluged with business. It may well be that courts are no longer able to discharge their traditional function but will be required instead to assume a new role. If so, the loss will be great. Courts are like other important institutions in American life; they share the commitment to attempt to achieve appropriate excellence. There are times, however, when the nature and processes of institutions must

change because their responsibilities *222 must change. This has been the case with other institutions in American life and it may also be the case with the courts. It is possible, after all, to conceive of courts as mini-legislatures. But if courts are to function as mini-legislatures, then they must adapt to the requirements of the political process. Public opinion and political responsibility inevitably become important factors in the decision-making process. This is always the case, but the change will make the courts more vulnerable, and their service to the country will be of a different kind. One has to weigh the costs.

Dean Pound observed the deficiencies in American jurisprudential theory. He created a jurisprudence of interests that took into account the ideal of social engineering. A major difficulty today has been the lack of discussion within society as to the basic problems we face. Our political institutions have often placed a premium on ambiguity in policy formulation, an ambiguity which is itself a cause of our present dissatisfaction. The responsibility thereby placed on courts-to discover and implement social policy-is certainly difficult if not intolerable. There is an exigent need for our other institutions-and not only governmental-to clarify paramount issues and to develop remedies which work with least social cost. If the courts are to become problem solvers, and not dispute solvers, then perhaps one has to think of new kinds of cooperative interrelationships among the courts and other agencies, governmental and private, which would be improper or strange if courts maintained their traditional role.

I feel compelled to note that our society presently finds dissatisfaction a powerful motive force. Ironically, it finds a certain satisfaction with dissatisfaction. The panelists have been eloquent on some of the matters to be dissatisfied or at least worried about. There is some reassurance in knowing that we are not complacent. There is great wisdom in having the opportunity to rethink our direction, although the nature of government often makes that process difficult. There is always the danger that the purpose of reassessment will be misunderstood. It is regrettable that the world is such that proposals for judicial reform today must always be followed by the disclaimer that the proposals are not a suggestion that deprivations of human rights be countenanced. They should not be. Courts must continue to be, as they have been in the past, indispensable prosecutors of our basic freedoms. They have accomplished much, and they are highly regarded for that work. But the problems we face as a society are often not susceptible of judicial resolution. To rely on the courts alone, or even primarily, for the solution to our problems *223 may itself be to countenance our eventual default, as a people, in our commitment to the establishment and preservation of equal justice for all.

a7 This address includes a summary of the views of panelists and commentators on the subject of "The Business of Courts: What types of Disputes Are Best Resolved by Judicial Action and What Kinds Are Better Assigned to Another, More Appropriate Forum?"

IMPROVEMENTS IN THE JUDICIAL SYSTEM: A SUMMARY AND OVERVIEW [a8]

by LAWRENCE E. WALSH

President, American Bar Association

Thank you Mr. Chief Justice, Mr. Attorney General, Mr. President-Elect and thank you ladies and gentlemen for your gracious welcome.

I would have liked to have had until tomorrow, but I believe that by tomorrow I would be convinced that I liked the system the way it is and that I might not fulfill the function assigned to me.

I would like at the outset to thank the Chief Justice for the inspiration of this Conference. I think it has been of tremendous value to each one of us here. This group has been assembled from federal courts, state courts, the practicing bar and the universities under his sponsorship, impelled by his drive-an experience of a lifetime for most of us.

I would also like to thank Chief Justice House for his graciousness. His ready support and his bringing into this group the all-important 50 state chief justices whose courts in terms of service to the people have a far more ranging impact than the federal system are of great importance for all of us.

I thank you for the privilege of addressing you this evening, and as I look over this room and see the faithfulness with which your attendance has been maintained, I am impressed, and again, I think it augers well for this Conference. I told the Chief Justice that I didn't think the group could possibly stay thru Friday night. He felt differently, and as usual, he was right.

It is remarkable that as the Conference started, and as Judge Rifkind led us into his subject, how the feeling welled up that we should have done this long ago, certainly. And then as ***224** the counter-arguments developed, we realized that whatever our situation is today, there is a reason for it, and that we're not going to be able to make a large number of fundamental changes without giving up something, and usually something that some of us like very much. But we are obligated to make our system work, to get something better for the public than that which it gives up.

We all agreed at the beginning not to attempt to agree on solutions but to isolate questions, to establish tentative priorities: to preserve the quality of our system of justice, to preserve access to our courts on those matters which only the courts can handle, to reduce delay and costs and the uncertainty of litigation. One distinguished member of the Conference said that many of the suggestions and questions have been plowed and re-plowed many times, and he's right. We are here not primarily to develop the original idea, but to share with each other a compilation of ideas, ideas which men of learning and experience think worthy of our joint consideration.

Speaking for the American Bar Association, we should like to undertake, in the first instance, responsibility for a follow-up. I am very pleased to say that the American Judicature Society, under President Adams, and the Institute for Judicial Administration, under President Kaufman, have both simultaneously offered their help, the help of their organizations. I believe there will be a follow-up. The question is how to go about it.

The President-Elect of the American Bar Association has already developed plans for a task force on the resolution of minor disputes which will now be accelerated. The appropriate officers of the Association will meet within two weeks to sift out the various ideas to see what we can do in the way of a study, and we should very much welcome your suggestions as to tentative priorities.

I might tell you at the outset that there are a number of things which are already being done. There were references to the representation of the indigent. The Legal Services Corporation which has been created with the strong support of the organized bar is serving perhaps one out of seven indigents needing services. As far as the organized bar is concerned, we can at most develop the concept, because obviously, we cannot fund support for these immense ventures. What we can do is help them get the government aid, the government support, which they need. Once the concept is in place, once people like Dean Ehrlich, the new president, is heading it, why then it's a matter of supporting it.

***225** As to middle income groups, concepts are now being developed. Prepaid legal service plans already serve 800,000 families and the Prepaid Legal Services Institute is developing plans for a more broadside attack. There are four state bar associations which are undertaking to develop statewide plans.

We are also experimenting with alternatives. An experiment in legal clinics is now underway. At the last meeting of the Board of Governors, an award of $60,000 was made for an experimental clinic to see whether by cost reduction and by getting rid of the frills, lawyers can provide effective legal services at low cost. Other items of cost reduction are receiving attention from the Association.

In two fields that the Chief Justice mentioned in his opening, family law and probate law, the Association supports the Uniform Codes in both areas. Some state bar associations are now seriously debating the exclusion of uncontested probate and uncontested divorce from their courts. These proposals may not have carried, but the fact is that they are under serious consideration.

In short, what I would like to say is that the bar is not resisting change. This is not 1906. The Chief Justice could have come out the front door after his opening address and we would have carried him on our shoulders.

With regard to small claims, it so happens that the American Bar Foundation has already undertaken research on consumer fraud. The National Center for State Courts and the Judicial Administration Division have been funded by the National Science Foundation for a study of the parameters of the small claims court, and as I mentioned before, the President-Elect will broaden this into a major undertaking of the Association. What we envision is the establishment of a task force, dissemination of material from this Conference to the state and local bar associations and a preliminary report on this at the American Bar Association's Annual Meeting in Atlanta; so that by the time his term starts in August we will be in full motion towards the plenary conference which is contemplated for next spring.

Let us turn now to today's discussion. In the criminal area, Justice Schaeffer recommended serious reconsideration of the areas of suspect interrogation and reconsideration of the exclusionary rule. These are old subjects; they are subjects in which we found Holmes on one side and Cardozo on the other. The debate was started long ago. At this stage of his career with his fine achievements, Justice Schaeffer feels that these subjects ***226** are worthy of more consideration, and they shall have it. They will be presented for further consideration at the Atlanta Annual Meeting of the American Bar Association in August.

At Atlanta, I might say, the broad theme of dispute resolution will be further discussed and debated. In Atlanta there will be three days of examination of this subject to be shared with English lawyers and judges who are attending our Annual Meeting to mark the National Bicentennial. Both of these subjects lend themselves well to the interchange of views between the English and the Americans because of their different history with respect to them.

Judge Rubin raised a number of questions as to criminal justice. In the area of plea bargaining, as Judge Erickson pointed out, the American Bar Association standards have one point of view-permissible if done in the open, the advisory commission of the LEAA has a different view-impermissible. The ultimate conclusion is now in the public forum. Lawyers have considered it, they have come up with conflicting conclusions, as they sometimes do, and I think for the moment, it is in position for consideration as the opposing standards are debated on a state by state basis.

Judge Rubin also commented on calendar delays in criminal trials. This, it seems to me, should be a matter primarily for the courts. The bar of course, must cooperate and respond. In the final analysis, it is the judges who decide when the cases go to trial and who decide whether delay will be indulged or not. It is obviously a matter for reciprocal cooperation, but we must look to the courts for guidance.

He also spoke of different standards of competence in criminal and civil cases. Here, I think the bar has a major responsibility. We have a problem of resuming and focussing more sharply our attention upon post-graduate education in advocacy. This type of complaint can't be ignored. The Litigation Section of the American Bar Association has undertaken a study of standards of advocacy. At the same time, I think that the courts, particularly the federal courts, might think of tightening the relationship between the bar and the bench. In the Southern District of New York, the court does not know how many lawyers are members of the bar of that court. Anyone can become a member of the bar of that court. I don't know why those who are inactive can't be culled out on an annual or bi-annual basis so that, at the very least, there could be a division into an active and an inactive bar. Membership in either group would not pose a great ***227** problem if a person wanted to try a case, but there should be a smaller or more manageable active group with whom the judges could exchange views and improve standards. Thomas Deacy, President of the American College

of Trial Lawyers, feels strongly that the bar should be more active in the formulation of the rules of court and that they should be more active in assisting the courts in dealing with the problems of the bar. I think that neither the bar nor the bench can handle it very well alone. Together, I think we can do a lot better than we have.

The question of finality was raised in a comment from the floor by the distinguished Chief Justice of North Carolina in connection with the question of collateral attack on state judgments. The questions of finality of criminal judgments and collateral attack upon them can be viewed as an irritant and as a reflection on the efficiency of the judicial system. Again, I don't think there is a great deal that the organized bar can do with respect to this problem. It must be solved by the courts themselves.

I was surprised that so little discussion occurred concerning Judge Frankel's writings on more rigid sentences, expounding as he does a departure from earlier broadly held views on parole and indeterminate sentences. It is now argued that shorter, more definite sentences might be more effective in deterrence and in speeding up the process of criminal justice-by getting criminal justice away from the overshadowing, horrendous long sentences that magnify the significance of each procedural question and compel defendants to exploit them as fully as possible.

The decriminalization suggestion seemed to raise not a ripple of opposition. I don't remember any argument about it. As far as I can see, we could pass a resolution here tonight to get rid of victimless crimes. I was amazed by Judge Rubin's statement that we don't have statistics on the number of people arrested in this country. Estimated at 9 million, 7 million are apparently in this category of conduct. These could be dealt with in some other, less elaborate, less bruising fashion than that imposed by criminal laws.

Turning to the civil side, again Justice Schaeffer led off with a real wallop, suggesting that we now consider the elimination of juries in civil cases. I suppose the remarkable thing is that it was so well received, not without controversy, but with, I think, substantial respect that this proposition is now ripe for consideration. An intermediate position was advanced: eliminating jurors in the more complex civil cases. The reasons I ***228** won't take time to elaborate: the 40% slower process of a jury trial, inconsistency of result, sympathy, and the inability to split up trials into more convenient pieces were obvious reasons for its consideration. On the other side, I think there was a very substantial number of us who would feel regret if this must be. The jury is the most significant participation by non-lawyers in the administration of justice. We recognize that delay and cost which make the courts less useful to the public can't be tolerated, but those of us who have worked with juries know that we'll lose something of value in the process.

Judge McCree pointed out that the lack of data to support this is a problem which seems to haunt us all the way through. As Dr. Nader also pointed out, we don't have the data and the empirical studies to support many of our instinctive suggestions. Justice Stores from Alabama said that inefficiency wasn't an adequate reason to dispense with the jury. Others pointed out that the juries aren't a source of unpopularity, and that, indeed, they are important for our community relations. They give citizens an opportunity to participate in the administration of justice. I would feel badly to see the jury go because I don't remember juries making too many mistakes in cases in which I participated. Judge Gignoux said, “Well, that just makes the point; the judge would come out with the same decision as the jury would and do it in 40% less time.”

Dispensing with juries obviously is going to take study and must be addressed with all the cautions that we exercise in dealing with that which has been regarded as a fundamental part of our system. Projects on the value of juries have actually been generated by the Judicial Administration Division and the Federal Judicial Center, but I think that we must now, with the interest of this group, address this question more broadly. I'll come to the problem of funding some of these studies later, but it is obvious that this is nothing that can be done lightly or casually.

Turning to the next question that was raised, that of discovery, Judge Rifkind's idea of a preliminary finding of merit seemed to receive general support. There was a great deal of talk about judicial supervision of discovery, yet, I always

wonder how it is going to be accomplished in a busy court. I know that with the pressures on the judge to do that which only he can do, it seems unduly burdensome to ask him to deal with this more mechanical problem of discovery. For some reason, summary judgment, motions to dismiss, don't seem much more popular now than they were when the courts were less burdened. Judge ***229** Rifkind's proposal offers a less drastic solution and one which should be pursued with further discussion, study and experimentation.

Mr. Kirkham also called our attention to Rule 11 by which a lawyer attests to his belief in the substance of his pleading or at least its substantiality, and the fact that we've ignored this sanction. This is a matter, I think, primarily for the courts.

Class actions received a particularly vigorous attack. At the very least there seemed to be a consensus that "opt-in" should be the rule rather than "opt-out". Mr. Kirkham noted in his address, that these actions were of little benefit to the plaintiff, with large fees to the lawyers and disproportionate possible damage to the defendant, that they have an *in terrorem* aspect. An appropriate study should be undertaken to sift out the factors which will define that which should be preserved as a proper class entry to the court by those who need it and yet get rid of those actions which are brought for specious purposes.

The Chief Justice earlier invited the bar to submit proposals to the Advisory Committee on Civil Rules of Procedure whose province this is. Again, we are confronted with the need for data. Our subjective reactions to these proposals are probably dependent on where they strike us in our personal activities. Again, the need for more empirical work in our profession and the accumulation of better data is obvious.

The question of diversity, the suggestion of curbing diversity cases, seemed to provoke relatively little opposition. I was surprised, but I think in view of lack of opposition, we can assume that this is something which this group, at least, if it doesn't support it, doesn't resist.

There were a number of special categories of present court cases that were mentioned by the Chief Justice for possible change or transfer to other tribunals.

In the area of no-fault in accident cases, the American Bar Association is not resisting change. It has supported a state by state experimentation in this field. This experimentation has been going forward now 2 or 3 years. It may be time to pick it up and see where we are coming out, whether the savings that had been anticipated have developed and what the next step should be.

Medical malpractice was mentioned. Over a year ago the Association set up a distinguished interprofessional Commission in this area. It will present an interim report in Atlanta in August. Its final report will be presented at a conference next spring.

***230** Environmental decision-making: the Association is trying to scrape together funds for such a project. The Standing Committee on Environmental Law has completed a working study and has developed a project for a study of decision-making in this area. If we can get the money, we will be ready to implement it.

Judge Rifkind mentioned the "too big" case, the case that's too big for our courts. I don't know what to do about this, but I do know that it is an area we must address, either in the Anti-trust Section or the Litigation Section. We must examine the factors which might be useful in testing it and develop alternative procedures.

The alternative procedures for dispute resolution which were so well presented by Professor Sander should certainly be looked at in connection with small claims. These are areas in which the Association has been working jointly with the American Arbitration Association. We will continue to do so, and I think that the bar will take the necessary steps to make arbitration a more viable tool for dispute resolution.

The Attorney General dealt with Dean Griswold's observations on the need for more judges and more circuits and Mr. Johnson's comment on the under-contribution of our government to the administration of justice.

I come now to one last item, and this comes out of Dr. Nader's discussion of our profession's absence of data, absence of breadth of thinking, absence of "reality testing", absence of orderly and controlled experimental activities, and I add to that now, absence of adequate funding necessary to conduct these broader studies.

There was a time when the American Bar Association worked solely in committees. They met 2 or 3 times a year, worked half a day, played golf and then wrote a report. It doesn't work that way any more. These more difficult studies go on from year to year. Although we are all volunteers, although we are scattered across the country and it is difficult to get together, there are a number of devoted people who do this. And yet, there is a limit to how much they can do because of the inadequate funding that we can put together. There are some foundations, whose representatives I see here tonight, which have been very generous and which have made it possible for us to accomplish much. The time is coming, however, for the development of some type of governmental funding agency to produce the funds for law and political science comparable to those which ***231** have been produced for medical science and other areas of science.

Great studies in scientific thought and technological developments are going to make even more trouble for us than we have now. Even with the assistance of generous foundations, our profession, as much as it would like to do so, and as serious as it is about the problems confronting us, just doesn't have the necessary funds to conduct proper studies of these problems before they come upon us. Governmental funding would make it possible for us to deal with the problems that have been raised in the last two days on a far more satisfactory and objective basis.

For a group of people assembled together with no advance interchange among us, no rehearsals, this has been a superb conference. I thank each one of you; particularly the Attorney General who has been with us throughout, and especially to the Chief Justice who brought it all about. Thank you, very much.

a8 This address includes a summary of the views of panelists and commentators on the subject "Can the Interest of Justice be Better Served with Processes Less Time-Consuming and Less Expensive?"

DEALING WITH THE OVERLOAD IN ARTICLE III COURTS

by THE HONORABLE ROBERT H. BORK

Solicitor General of the United States

I have been asked to say a few words about an embryonic project within the Department of Justice which, we have the temerity to believe, may be relevant to your deliberations. It is only fair, if painful, to say that our effort has been embryonic rather longer than nature usually provides for that stage of development, but it is also true that we have begun to progress, and that we hope soon to have substantive proposals developed sufficiently to solicit comments. What I have to say today, however, represents my own thought and not that of the departmental committee I chair. Most particularly, it does not represent the views of the Attorney General or the Deputy Attorney General, gentlemen who have enough opinions of their own to answer for without this additional burden. Before a departmental position is taken, quite obviously, the Attorney General and the Deputy will have to be persuaded of the self-evident correctness of what I am about to say to you.

Your topic today concerns the types of disputes best assigned to courts and the types better assigned to another forum. The ***232** question appears to assume that we have been using courts to resolve some disputes for which they are not suited and that assumption is certainly justified. Yet candor, if not, in this company, prudence, requires me at least to remark in passing that some of the judiciary's problems in this respect are self-inflicted. The truth is that the more

appropriate forum for many disputes now resolved by the judiciary is the democratic political process. Courts have upon occasion strained language and doctrine to extend their powers of review in an effort to ensure fairness in the manifold relationships of government and individuals. The intention is commendable but the result is often an unjustified shrinkage of the area of majority rule and, more to the point today, the acquisition by the judiciary of problems which they lack the criteria and the information to handle. We should not forget, then, that part of the solution to the problem posed lies entirely within the control of the courts.

But the topic I will address, and the topic that will be addressed by the committee the Attorney General has established within the Department of Justice, constitutes a different slice of your concerns here. It is the allocation of types of disputes between different Article III courts and between Article III courts and other kinds of tribunals. We were brought to study that by the observation that there is, and for some years has been, a slow crisis building in the administration of justice by the federal court system. It has been urged at this conference, and properly so, that we think not just about the problems of judges but attend also to the problems of litigants. A crisis for the courts, however, is as well a crisis for litigants and for the society.

The cause of the crisis is simply overload, an overload so serious that the integrity of the federal system is threatened, an overload so little recognized that the bleak significance of plain, not to say obtrusive, symptoms is not fully credited by the bar, and, apparently, not by Congress.

Increasing population and commercial and industrial growth would in any event cause a rise in the federal caseload, but such causes would hardly have produced figures such as those with which we are all too familiar. I will not repeat the statistics in detail but it is apparent that caseload has not merely risen dramatically but that the real acceleration began in the 1960's. In the period of twenty years from 1940 to 1960 the increase was just under 77 percent, but in the next fifteen years, it was just over 106 percent and it continues to rise.

***233** The reason for increases so large seems apparent. We, along with every other western nation, are steadily transforming ourselves into a highly-regulated welfare state. The tasks government undertakes grow steadily more numerous and always more complex. All of the branches of government are changed by the pressure of decision making but perhaps none more than the federal judiciary.

The proliferation of social policies through statute and regulation creates a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model. The symptoms are everywhere.

As caseloads rise, courts try to compensate. Time for oral argument is steadily cut back and is now often so short in the courts of appeals as to destroy most of its value. Some courts of appeals eliminate oral argument altogether in many cases. The statistics are not entirely clear but perhaps 30 percent or more of the cases are decided without any oral argument whatever.

The practice of delivering written opinions is also declining and now seems to be omitted in about 34 percent of decided cases at the court of appeals level. Some of the opinions shown as per curiam are actually only summary affirmances.

These trends are disturbing for they may erode the integrity of the law and of the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy.

There is more. These are merely the most visible symptoms. Courts are adding more judges, more clerks, more administrative personnel, moving faster and faster. They are in imminent danger of losing the quality of collegiality, losing time for conference, time for deliberation, time for the slow maturation of principle.

As a society we are attempting to apply law and judicial processes to more and more aspects of life in a self-defeating effort to guarantee every minor right people think they ought ideally to possess. Simultaneously, we are complicating trial and pretrial procedures in what must ultimately be an impossible effort to make every trial perfect. The two trends, I think, are flatly incompatible. ***234** We are seeking to handcraft every case. At the same time we are thrusting a workload upon the courts that forces them towards an assembly line model.

Assembly line processes cannot sustain those virtues for which we have always prized federal courts: scholarship, a generalist view of the law, wisdom, mature and dispassionate reflection, and-especially important for the perceived legitimacy of judicial authority-careful and reasoned explanation of their decisions.

It was suggested last night that, with the decline of other institutions that create and sustain social norms and ethical values, law must take over more of that role. If law fails to perform that function, it was said, society will be in deep trouble. It is worth noting, therefore, that as law proliferates and is made up faster and faster, it tends to become intellectually incoherent and inconsistent within itself. Law in that condition cannot command respect and cannot succeed as a bulwark of a moral consensus.

It is for these reasons that the Department of Justice decided to study the problem and to suggest solutions. Quite possibly, as some of the speakers this morning suggested, we rely upon formal adjudicative processes too much. Possibly, as a society, we rely upon law too much. But these are matters beyond the scope of our study and our efforts. We are accepting the adjudicative process in something like its present form as given, at least for federal law in the foreseeable future, and asking what can be done within that framework. It seems to me, though my supposition has not yet been laid before my colleagues at the Department, that one remedy lies in a thorough-going overhaul of federal jurisdiction rather than tinkering with such things as the jurisdiction of magistrates or continually adding federal judges.

I recognize that more judges are desperately needed now but it is not the preferred solution. A powerful judiciary, as Felix Frankfurter once said, is necessarily a small judiciary. Large numbers dilute prestige, a major attraction of a career on the bench, and make it harder to recruit first-rate lawyers. Large numbers damage collegiality, lessen esprit, and diminish the possibility of interaction throughout the judicial corps. The likelihood not only of inter-circuit but of intra-circuit and inter-district conflicts rises, with all the costs of increased confusion and litigation that entails. However essential it is today, and it is essential, in the long-run continual increases in the size of the federal judiciary may prove a calamitous answer to the problem.

***235** I will suggest in a moment a way of keeping the Article III judicial corps small while increasing the federal capacity for adjudication.

We are forced, I think, to the conclusion that only a reallocation of disputes among types of tribunals offers any long-run hope for the federal judicial system. Some of what I have to say will be familiar; some, I hope, will not. Taken together, these suggestions add up to a proposal for a drastic reduction of the jurisdiction of Article III courts.

The criteria to be used in reallocating disputes to other tribunals are whether the present allocation is necessary to serve some important value and whether the courts now deciding cases are better qualified, have greater expertise, than the alternative forum.

Let me begin with the Supreme Court, where, I am sorry to say, I have, at least so far, least to suggest. The pressures upon that Court are reaching intolerable levels and it is imperative that something be done to relieve them. The most

recent proposal is the creation of a National Court of Appeals. Some of the support for this proposal, however, rests upon an ambiguity. The Commission that proposed it did not intend to lighten the workload of the Supreme Court. They intended to double the system's capacity to make final appellate decisions of national scope. Their premise is that too many important inter-circuit conflicts go unresolved because the Supreme Court cannot address them. Judgment in such matters is necessarily somewhat impressionistic and I can only say that I am not aware of a serious problem in this respect, certainly not a problem of the dimensions that would justify a major structural change in the federal court system. The solution is disproportionate to the problem.

Others, including some Justices of the Court, are attracted to the idea of the new court as a means of lightening the Supreme Court's burden. I am not at all sure it would. The Supreme Court would have to make additional decisions. Besides deciding whether a petition for certiorari presented a case meriting review, the Supreme Court would have to decide whether the issue was appropriate for it or for the National Court of Appeals. That is no simple decision, particularly since it is often difficult, at the jurisdictional stage, to know precisely upon what a case may ultimately turn or what implications the decision will have. To know those things is effectively to have decided the case.

Moreover, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Supreme ***236** Court, to ensure that an issue had not been definitely resolved, or even dicta pronounced, in a manner contrary to its own views. The necessity of granting plenary review of a decision of the national court might arise frequently, particularly if the judicial philosophies of the two benches should differ to any significant degree. That would impose upon many litigants four separate tiers of federal adjudication, and the result might be to increase rather than decrease the burden upon the Supreme Court.

If I am highly dubious about the idea of a National Court of Appeals, I confess that I am also not sure what can be done to relieve the Supreme Court. But it is clear that the abolition of mandatory appeals would be a substantial contribution. Whatever their merits once, three-judge district courts are simply no longer necessary and they waste judicial manpower at the trial level. Virtually all the supposed benefits of three-judge courts are obtainable under current law when a court of appeals stays an injunction issued by a single district judge. Courts of appeals, which are also likely to represent a broader cross-section of the nation, are quick to stay injunctions issued in highly controversial cases.

Cases on direct appeal from three-judge district courts typically make up about 3 percent of the Supreme Court's docket but, despite summary disposition of the majority, they routinely constitute the astonishingly high figure of 22 percent of all cases argued orally. Furthermore, the cases reach the Court directly from a trial court without an intermediate opportunity to sift the record and focus the issues. They thus consume a proportion of the Court's time and energy disproportionate to their members. They should be abolished. [1]

If we turn our attention to the courts of appeals and the district courts there are more obvious targets for reform. The first one is the old favorite, diversity jurisdiction.

In 1975 there were 30,631 diversity cases pending in the federal courts, or 21.5 percent of the total docket. That figure may be discounted in certain ways, although we are not sure how large the discount should be. It is possible, for example, that diversity cases take up less judicial time on the average than do other types of cases. It is also possible that they are settled out of court in greater proportions. We do not know and those matters will have to be investigated. But on any view of the question, diversity jurisdiction comprises a large segment of the federal docket. If ***237** it can be abolished without serious costs to the administration of justice, the benefits to the federal system would be substantial.

The historic argument for diversity jurisdiction-the potential bias of local courts-derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. It may be safe to assume that this rationale has now been so weakened that it no longer supports the practice. [There are proposals to leave with the out-of-state party the discretion to choose the federal forum, but that option would probably

undercut the reform. To say that is not to admit the existence of regional bias but rather to recognize that federal courts have other attractions to litigants, a fact shown when local plaintiffs choose the federal court.] It would probably be better to limit the option for the federal forum to those cases in which the out-of-state party can make at least a colorable showing of local prejudice.

Federal courts have no expertise in the application of state law and are particularly disadvantaged when a diversity suit requires the decision of a point not settled by the state courts. Nor would abolition of diversity jurisdiction harm the state courts. It would increase their dockets apparently only by about 1.5 percent.

An argument that must be taken seriously, because of the source from which it emanates, is that diversity cases serve the useful purpose of reminding federal courts they are courts and not simply constitutional tribunals. The idea appears to be that immersion in common law and statutory issues of the sort provided by tort and contract actions conditions the judge's thought so that he does not emerge as a free-hand policy maker when he approaches constitutional issues. The answer seems to me to be that federal question jurisdiction keeps judges close enough to hard, technical issues to keep them versed in close reasoning and that any incremental discipline provided by automobile accident cases is too small to justify the costs to the system.

But it is my third suggestion that I regard as in some ways most interesting and most important for the future. An increasingly regulated welfare state generates an enormous amount of litigation. The programs may have great social importance but the issues presented are in large measure legal trivia. Nevertheless, we have thoughtlessly moved this mass of litigation into the federal courts, without regard to whether it belongs there or what we are doing to those courts.

We ought to consider an entirely new set of tribunals that would take over completely litigation in a variety of areas where ***238** an Article III court is realistically not required. Criteria for making that judgment would include: (1) the disposition of cases in the category turns upon the resolution of repetitious factual issues; and (2) the category of cases consumes a large amount of Article III judicial resources. I am trying to describe cases that can be handled as justly by a person resembling an administrative law judge as an Article III judge.

The categories of cases I have in mind might include those rising under the Social Securities laws, the National Environmental Policy Act, many prisoners' suits, the Clean Air Act, the Water Pollution Control Act, the Consumer Products Safety Act, the Truth in Lending Act, the Federal Employers' Liability Act, and the Food Stamp Act. Other examples can be found. I suspect that cases under the Mine Safety Act and the Occupational Safety and Health Act would qualify. It should be noted that some of the regulatory schemes, though not legally complex, produce masses of paperwork that require an extrordinary amount of judicial time in each case. Often the assessment of such materials can be done by someone far less qualified than a judge.

If these categories of cases were removed from the federal district courts, their dockets would be relieved of well over 20,000 cases, and, because our figures are still incomplete, perhaps well over 30,000 cases. If diversity jurisdiction were also abolished, it appears that district court dockets could be lightened by over 40 percent. More important, the future growth of those dockets could be made manageable if Congress would place factual disputes arising under new regulatory and welfare programs in these tribunals.

Because of constitutional questions, I am at the moment unsure whether these new tribunals could be Article I courts or whether they would have to be specialized Article III courts. Let me assume for the moment that they could be Article I courts, which, for various reasons, might be preferable. In that case, the system envisaged would work roughly like this.

There would be a trial division from which appeals would be funneled to an appellate administrative court, and the litigation would end there. There would be no access to an Article III court unless an important question of statutory construction or ***239** constitutional law was raised, and only the legal question could be certified to the Article III

court. [2] Since access to Article III courts for statutory and constitutional issues would be preserved, we would preserve the systems' ability to respond to claims of human rights.

Note that this plan avoids one of the major pitfalls in proposals for specialized courts, for these tribunals would not be specialized by a single subject matter. In the range of types of cases they would handle, they would have many of the advantages of generalist courts. They could, moreover, provide significant advantages for litigants by speeding decision and cutting the expense of litigation. Many classes of cases could be handled informally, without counsel, unless the claimant desired an attorney, giving some of the hoped-for advantages of small claims courts. This would vary. Some cases might require rigorous procedural and evidentiary rules as well as the assistance of counsel, but that degree of rigor could perhaps be dispensed with, for example, in the ordinary Social Security disability case.

These are the major suggestions that will be under consideration. We would very much appreciate your comments upon them and any ideas you may have to cure judicial overload before it reaches intolerable levels. The federal courts, as Judge Higginbotham so eloquently reminded us, have been an extraordinary national asset. It is worth an extraordinary effort to save them.

1 28 U.S.C. §§ 1252 and 1254(2) should also be repealed. They provide mandatory appeals and would be used much more if three-judge courts were abolished.

2 If necessary to the constitutionality of the plan, certiorari jurisdiction over factual decisions could be lodged in the Article III courts of appeals. Alternatively, the special tribunals could be organized as Article III courts of limited jurisdiction.

JUDICIAL SELECTION AND TENURE

by THE HONORABLE JAMES A. FINCH, JR.

Justice, Supreme Court of Missouri

I am advised that in planning for this Conference, the Committee concluded that nothing is more important in accomplishing the objectives sought by this Conference than the quality of the man on the bench. Under such circumstances, the committee concluded that the speech at this luncheon should be devoted to the subject of Judicial Selection and Tenure and I was drafted for that assignment. Accordingly, I shall devote ***240** approximately the next twenty minutes to a discussion of developments in this field. In so doing, I am mindful of the story of the doctor who, after examining a patient, gave him six months to live. At the end of six months, the patient was still alive but hadn't paid the doctor's bill, so the doctor gave him another six months. I do not anticipate that the committee or the chairman would give me another twenty minutes. Hence, I will confine myself to an overview of this subject.

Starting in 1913, the American Judicature Society began to advocate a merit selection method for choosing judges and in 1937 the House of Delegates of the American Bar Association approved a non-partisan plan for the selection of judges. Then in 1940 Missouri became the first state to adopt such a system. It called for recruitment and screening of potential nominees by nominating commissions consisting of lawyers elected by the lawyers, non-lawyers appointed by the Governor, and a judge from the Supreme Court in the case of appellate vacancies or from the Court of Appeals in case of commissions to nominate panels for our trial bench. It provided for submission of a panel of three nominees for each vacancy, with the Governor then appointing one of the three. Finally, it provided for periodic retention elections on separate judicial ballots. The plan was made mandatory for all appellate judges and for trial judges in St. Louis and Kansas City, with a provision for local option as to other circuits in the state.

This concept sometimes is described as a merit selection plan and sometimes as a non-partisan judicial system. That variation in terminology reminds me of the story told about Noah Webster of dictionary fame. As you would surmise, he was reputed to be a stickler for precise use of the English language. Supposedly, on one occasion, his wife came

into a room and observed Mr. Webster embracing another woman. “Mr. Webster”, she remarked, “I'm surprised.” Immediately, Mr. Webster responded: “My dear Mrs. Webster, will you never learn the correct use of the English language. You're astonished; I'm surprised.”

I'm not sure which of the terms is most descriptive, but I will use the term merit selection in my remarks.

Gradually since 1940, other jurisdictions have adopted merit selection in some form. In some instances, the plan has involved all the judges of a state. Sometimes, the system has mandated the plan as to some judgeships or areas, and provided for local option elsewhere. In still other instances, the plan has been ***241** adopted by cities or other jurisdictions smaller than an entire state. Some have adopted the system by means of constitutional amendments, some by statute and some on a purely voluntary basis.

In most instances, the plan has been adopted as a replacement for an elective system. Various factors have induced these changes. One has been that sometimes unsatisfactory or unqualified judges were elected under the old method of election on party ballots. That was true in Missouri. In Oklahoma such a plan was adopted following a scandal involving some members of the Supreme Court of that state. I do not mean to imply that there have not been very able judges produced by the elective process. There have been-many of them. However, there also have been instances of election of unqualified and unsatisfactory judges, particularly where candidates have been selected and slated by party bosses on political, not merit, considerations. Sometimes, able judges have been defeated for reelection by much less qualified persons solely because of political landslides having nothing to do with judicial matters or the merits of the judicial candidates. It has also been true that many able lawyers would not subject themselves to the political process of selecting judges.

A second factor influencing decisions to adopt merit selection in lieu of political election has been the fact that campaigning for office has become increasingly expensive, necessitating large campaign funds. The spectacle of judges or their campaign committees soliciting and accepting substantial sums from lawyers who then practice in those courts and from businesses which may have cases in those courts creates at least the appearance, if not the fact, of conflicts of interest and of impropriety. Such occurrences cannot help but erode public confidence in courts.

Still another factor influencing decisions to abandon the political elective system has been the time required for campaigning for nomination and later for election. At times, such demands are very considerable, with the result that time which a judge could be spending to dispose of the business of his court must be spent in political campaigning. Mere survival in an elective system so demands.

Dean Pound obviously was disturbed by a system of electing judges in partisan elections because in his 1906 speech he said: “Putting courts into politics and compelling judges to become ***242** politicians, in many jurisdictions, has almost destroyed the traditional respect for the Bench.”

As a result of some or all of these factors, plus a lot of work by organizations and people interested in improving the administration of justice, there are twenty-seven jurisdictions, so American Judicature informs me, which now select part or all of their judges pursuant to a merit selection plan. These plans have been tailored to fit the perceived needs of each particular jurisdiction. They are not identical, but all involve merit selection.

There has been less transition to merit selection in jurisdictions employing an appointive system, but merit selection is just as desirable in such situations and some interest therein has been and is being shown. Recent developments include a national conference on federal judicial selection held last month under the sponsorship of the American Bar Association and the appointment of a prestigious American Judicature Society committee to study the feasibility of a federal judicial nominating committee or committees. Of course, the sometimes utilized procedure of having potential appointees to the federal bench screened and rated by A.B.A. committees, although lacking the opportunity to propose prospective

nominees, involves the objective of insuring appointments based on qualification from among names submitted to the committee for screening.

Sometimes, the observation is heard that merit plans merely substitute bar politics for partisan politics, giving lawyers a larger role in the selection of judges. This, it seems to me, amounts to saying that we should not go to merit selection because the system is not perfect. In response, let me say that I'm reminded of the story of the two old friends back for a college reunion who were reminiscing and comparing their situations and one said to the other, "How's your wife?"" to which the other responded, "Compared with what?"

I would not argue that political considerations never enter into the picture in a merit selection plan, or that the plan is perfect. It depends on people and people are not perfect. Persons, when considering judicial selection, should ask themselves what are the relative advantages and disadvantages of the various systems available, not whether they perceive some feature of merit selection which they deem imperfect. Such analysis should include inquiry as to which will most likely make the best of the profession available; which is most likely to avoid obligations, either real or seemingly apparent, to campaign contributors ***243** or political supporters and sponsors; which avoids spending time in political activities which is needed for judicial duties; and which is most likely to inspire and retain public confidence and support?

I can tell you that we have found in Missouri that our governors have not selected from panels submitted only those persons who were members of the governor's party. Instead they frequently have appointed a judge who is not a member of the governor's party; and I can say in all sincerity that during the two years I served as chairman of our Nominating Commission, during which we submitted numerous panels, I did not observe that our nominations were the result of either bar politics or partisan politics.

Professors Watson and Downing of the political science department of the University of Missouri have studied judicial selection in considerable depth. In 1969 they authored "The Politics of the Bench and Bar". Last September, Professor Watson delivered an address to the annual meeting of the American Political Science Association in San Francisco on the subject, "Staffing The Courts-Where Can We Go From Here?" In that speech he discussed the various methods of selecting judges. He then advocated abandonment of the elective system to choose judges, suggesting instead the use of merit selection-the use of nominating commissions with appointment by the governor. He then proposed that additional professional persons, such as law teachers and social scientists interested in the judiciary, be included on the nominating commissions.

Hopefully, extension of merit selection will continue. The recent action of the American Bar Association in recommending merit selection in their Standards for Court Organization should help.

The second topic on which I want to touch involves the tenure of judges. Until fairly recently the only method of removing a judge for misconduct was by the traditional remedy of impeachment or, in the case of elective judges, by defeating them at the polls in the next election at which the judge was required to run for re-election. It is perfectly clear that these methods have not been satisfactory. Impeachment is slow and expensive. It interferes with the legislative process by requiring substantial time of an entire legislative body. It is a very inadequate remedy for disciplining judges, particularly since the adoption of codes of judicial conduct, the enforcement of which, on occasion, calls for discipline less severe than removal from office. Likewise, ***244** waiting for the next election, sometimes years away, is not the answer for dealing with current misconduct or disability.

The need for a substitute for impeachment, as well as a means of retiring judges for physical or mental disability, led to the adoption in 1947 by the State of New York of a Court on the Judiciary, a special court organized and convened when a complaint against a judge was filed by an official authorized by law so to do. Thereafter in 1960, California created a Commission on Judicial Qualifications to deal with retirement, removal and discipline of judges.

We adopted a constitutional amendment in Missouri which established a plan similar to the one in California. It provides for a Commission on Retirement, Removal and Discipline, composed of two judges, two lawyers and two laymen, which receives and investigates complaints, conducts hearings and if four of the six members concur in recommending discipline or retirement, as the case may be, files a report with the Supreme Court which then hears and resolves the matter. We have found it to be an efficient and satisfactory system. Its flexibility is demonstrated by the fact that we have had cases in which discipline ranging from removal through suspension to reprimand has been imposed. With reference to makeup of the Commission, Judge Dowd, chairman of the Commission, advised me recently that he is convinced, based on their experience, that there should be lawyers and lay members as well as judges on such a commission.

That a need for such a method of handling discipline and retirement existed is dramatically demonstrated by the fact that within the past 30 years, 46 jurisdictions have adopted some such system. Most are modeled on either the California or the New York Plan. In addition, Congress has established a Commission on Judicial Disabilities and Tenure which applies only to lower court judges in the District of Columbia, but I am informed that it has under consideration a bill to set up a Council on Judicial Tenure for the judicial branch of the Federal Government. I will not attempt to discuss that particular bill, but I do say that I have no doubt that some system to cover not only discipline or removal for misconduct but also retirement for disability is desirable for the federal system just as it has been for state systems. Impeachment simply is not a satisfactory solution for misconduct and there should be a prompt and effective method of dealing with disability, whether physical or mental. The public does not understand and finds unacceptable any instance in which a judge, state or federal, seemingly guilty ***245** of possible misconduct or physically or mentally disabled, is permitted to remain on the bench with no effort being made to resolve the questions raised.

I have heard it argued that such a system for retirement, removal and discipline undermines some of the necessary independence of the judiciary. I do not agree. That has not been our experience in Missouri and I do not believe it has been the experience of other jurisdictions establishing such a system. As a matter of fact, with merit selection and a proper system for retirement, removal and discipline, it is my view that members of the judiciary possess greater independence to consider and decide cases as their best judgment dictates. They are not captives of a system wherein they need support from party organizations or party bosses to survive an election. They are not required to raise substantial sums of money with which to conduct a campaign. They have no obligation, real or imagined, to heavy contributors or to political sponsors.

Judges should be supporters of adequate retirement, removal and discipline plans. They ought not be like the member of the congregation at an oldtime revival meeting who, after the minister exhorted the congregation to confess their sins and do right and work for the Lord, responded-“Amen, amen; use me, Lord, use me”. Then, after a pause, and brief reflection on the extent of his offer of help, added, “preferably in an advisory capacity”.

On the subject of tenure, I do not propose to discuss today what constitutes an appropriate term for which judges should be appointed under a merit system. However, I would point out that reasons for short tenure are eroded when the system calls for merit selection and an effective, prompt and fair method for retirement, removal and discipline is provided.

I heard described recently a proposed new device called the Selectomatic. It is a full length mirror equipped with a dial whereby you may see yourself as you are or as you would like to be. For example, if you would like to be 10 pounds lighter (or 20 or 30), you set the Selectomatic dial accordingly. Your head remains the same in each instance but your body then appears on the mirror proportioned as it would be if you should lose the specified weight. Allegedly, this furnishes extraordinary incentive to achieve your desired and selected weight.

This Conference is a kind of Selectomatic for our judicial systems. It is designed to help us plan for systems adequate for the task and which enjoy the confidence and support of the ***246** public. It is to enable us to project what should be as compared with what is. To that end we must continue to strive for a system which will attract and hold the ablest of

the profession to the judiciary. We also must give attention to the need to discipline or retire judges when situations call therefor, recognizing, as did the Supreme Court of Pennsylvania in the case of *In re Greenberg*, 442 Pa. 411, 280 A.2d 379:

> "For generations *** it has been taught that a judge must possess the confidence of the community; that he must not only be independent and honest, *but equally important, believed by* all men to be independent and honest. A cloud of witnesses testify that 'justice must not only be done, *it must be seen to be done*.' Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy."

As Dean Pound so clearly emphasized, we cannot be content with the status quo. We cannot, as did the song about the old time religion, proceed on the thesis that "It was good enough for father and it's good enough for me". We must recognize and be responsive to the need to correct causes for popular dissatisfaction with the administration of justice. That includes doing what we can to insure the quality of the man on the bench.

This is true, regardless of the conclusions reached and the changes made as a result of the discussions at this conference. Whether the courts handle more or fewer types of cases, whether the use of the jury is curtailed and whether new and innovative methods of dispute resolution are devised, the need to have the best man on the bench remains as essential as it is today.

The resolution of many of the questions raised at this conference will take time. New approaches will be explored and new mechanisms devised. This is not true with reference to advances in the field of judicial selection and tenure. We have the benefit of years of experience in which merit selection and realistic systems for disciplining and retiring judges have been utilized, tested and refined. This is one area in which it is possible to do something about insuring the quality of the man on the bench and, equally important, doing so in a system which will increase the confidence of the public in the judicial system. We have, I believe, the obligation to work diligently to that end.

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